

From: Mary Scott Nabers [REDACTED]
Date: October 23, 2017 at 11:44:51 CDT
To: "bc-peter.einhorn@austintexas.gov" <bc-peter.einhorn@austintexas.gov>
Subject: Letter of Concern for you!

October 23, 2017

Dear Mr. Einhorn,

For more than 20 years, Strategic Partnerships, Inc. (SPI) has represented companies across a broad spectrum of industries that do business with the city of Austin. The SPI Team provides them guidance and we help them understand the processes and procedures of government procurement. We also work diligently to make sure they never cross any ethical boundaries when responding to solicitation documents and competing for contracts.

It is on behalf of all our clients that I am writing to you now, as we believe the proposed changes to Austin's Anti-Lobbying Ordinance (ALO) pose an incredibly serious threat to the credibility of the City's ethics and the ability of businesses to continue effectively and appropriately in Austin, Texas.

More specifically, I would like to call your attention to two parts of the proposed ALO changes currently under consideration by the Ethics Review Commission:

- **No Contact Period** - The proposed changes to this provision would, if adopted, open the door for corruption and unethical behavior. This change would encourage influence peddling and it is impossible for me to believe that you, as elected officials, want this result. To allow lobbying efforts to continue after a solicitation is published and to allow lobbying efforts to continue for 60 days following a vote by the Council before the final contract is signed is unprecedented in state and local government. We can find no reason whatsoever that the current "no contact" restrictions should be changed – and certainly not for only one area of the City's procurement process.
- **Debarment** – Again, the proposed changes eliminating debarment would fly in the face of every principle of good government. The fact that this debarment provision has never been implemented is evidence of its necessity and purpose. I am unaware of any state or local procurement policy that does not contain a debarment policy. Why would the city of Austin limit the ability to preclude bad actors from participation in the solicitation process?

I and others have already met with many council members and staff about the recommendations of the Waste Management Policy Working Group that met over the summer. I, and the entire SPI Team, would like to reiterate our concerns about the City setting any precedent to treat individual industries and sectors differently from others. Policies that address lobbying and procurement processes are the critical components when businesses decide to participate in

public sector solicitations. Singling out individual contracts for special treatment is unheard of in the public sector and this would send a negative message to the business community, citizens, and the media and to taxpayers.


Austin's leadership has worked hard to create an environment that encourages diversity and a competitive environment for businesses across all industries. I urge you to ensure that we continue to be a city where vendors can be proud to do business because they are able to compete in an open, transparent and fair marketplace that is not subject to unethical tactics of any competitors.

Thank you for your service to our great city and for your judicious consideration of the concerns I've listed. As always, I am available to discuss this and any other issue at any time. I look forward to productive conversations as we all work to make Austin a great place to do business and the most admired city in the U.S.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary", with a large, elegant loop at the end.

Mary Scott Nabers
President/CEO



From: Andrew Dobbs [REDACTED]
Date: October 25, 2017 at 16:45:18 CDT
To: "bc-Jmichael.Ohueri@austintexas.gov" <bc-Jmichael.Ohueri@austintexas.gov>, "BC-Fredda.Holmes@austintexas.gov" <BC-Fredda.Holmes@austintexas.gov>, "BC-Mary.Kahle@austintexas.gov" <BC-Mary.Kahle@austintexas.gov>, "BC-Debra.Danburg@austintexas.gov" <BC-Debra.Danburg@austintexas.gov>, "Einhorn, Peter - BC" <bc-Peter.Einhorn@austintexas.gov>
Subject: TCE Position on ALO Changes

October 25, 2017

Commissioners:

I wanted to write today to let you know where Texas Campaign for the Environment stands on proposed changes to the Anti-Lobbying Ordinance. We appreciate your service and attention to this issue and look forward to discussing it more on Friday and next Wednesday. I may also try and call you tomorrow regarding this topic.

Texas Campaign for the Environment is particularly interested in the revision of the Anti-Lobbying Ordinance (ALO) because the City has had a series of non-competitive bidding processes for major waste and environmental service contracts. In some cases contracts were proposed for firms with bad environmental records because better firms have declined to bid, and Council declined to authorize those agreements, leading to operational challenges for City departments.

The waste, recycling, and composting industry is unique in that the City is both the

client for these contracts, a regulator for the respondents, and a potential competitor to these firms. Past perceived abuses of the ALO by staff and the possibility for future inappropriate action have prompted the present controversy. Amending it to effectively eliminate the possibility for these abuses will restore competitiveness to these important contract processes and present more sustainable options for the City.

This is why the Waste Management Policy Working Group of Council (Councilmembers Pool, Garza, Kitchen, and Alter) recommended an update to the ALO. They suggested some changes, Purchasing Department staff responded with some proposed revisions, and the Zero Waste Advisory Commission (ZWAC, the site of many of the conflicts associated with these contracts) unanimously suggested some edits to these changes.

TCE supports these recommended changes and encourages you to recommend them too. As for suggestions that we use the old ALO with just minor changes, this leaves too many of the major problems with the ordinance intact. In essence City staff can unilaterally determine what sorts of communications are violations and which aren't, and for vendors with existing business with the City this could put them at serious risk of disqualification even after putting substantial labor and resources into responding. If staff has as much power as they do under the present ordinance there is no effective mechanism for appealing their decision, leaving litigation as the only recourse. In the meantime polluting companies are getting Austin ratepayer dollars to harm our environment.

Without solutions to these threats we can anticipate non-competitive solicitations as long as this ALO is in effect. We hope that the urgency being suggested at this time will be harnessed for the sake of solving our problems for the long-term with a full revision of this crucial ordinance. The good news is that we are very close to that today, and with the suggested amendments included here we believe it can be completed in a matter of days, not weeks or months.

Thank you again for your service and your consideration of this important policy. We look forward to speaking to you soon!

Andrew Dobbs
Central Texas Program Director
Legislative Director
Texas Campaign for the Environment
(512) 326-5655
www.texasenvironment.org www.facebook.com/texasenvironment



ZWAC Recommendations:and Explanations

A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.

This ordinance is a restriction on staff; it does not make sense for them to have sole oversight of their own regulation. Appointed and elected officials need to review these rules before they are adopted. Note that we support allowing the ordinance to go into effect without rules if necessary for time-sensitive reasons.

Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.

While this could arise in the rules, it should not be left ambiguous at this stage. This should be enshrined as a central part of the ordinance, particularly since the lack of any appeal process under the current ALO has been a major driver in the present controversy.

Clarification that only Council may void a contract for violation for the ALO.

Contractors make major purchases and incur debts in order to provide services to the City. A voided contract could be devastating to their business, and such a serious decision should only be made by publicly accountable officials, not staffers.

Striking all sections which empower staff to require recusal of elected or appointed City officials.

The present draft would allow City staff to determine which commissioners and councilmembers get a vote on contracts, a major violation of the balance of powers between staff and Council. Staff can always recommend such recusals, but the power to compel them is entirely inappropriate.

Assurance that the ordinance will not consider public communications to be in any way a violation.

Staff have told bidders in the past that they are not allowed to speak even at commission meetings, and because the process for determining violations is arbitrary with no appeals process other than civil litigation these potential vendors have had to remain silent for fear of losing their business or incurring major costs. This needs to be explicitly clarified in the ordinance--everybody in Austin has a right to address their appointed and elected officials in public meetings.

Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.

Citizens groups and others that happen to share an interest with a respondent may advocate on their own behalf, and the City has no right to bar that First Amendment exercise or to punish respondents for someone else's behavior.

Definition of the term "response."

In the past staff have used ambiguity over this term as a means of pre-emptively disqualifying potential bidders. Current proposed changes should eliminate this possibility, but clarity could still prevent similar problems.

Clarification of subjective terms such as “influences,” “persuades,” “advances the interests,” or “discredits.” At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.

The ALO is a restriction of First Amendment rights, and we fear that ambiguous terms open to subjective interpretation are not narrowly drawn enough to escape litigation. These terms can be replaced with objective measures or strictly defined to avoid confusion, either in the ordinance itself or in the rules by direction of Council (with your advice).

Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.

Either a respondent has violated the ordinance or they have obeyed it. Explicitly empowering staff to create a grey area where some violations may be allowed on a case-by-case basis is a huge opening for potential problems. Most of the ambiguous behaviors that have generated controversy around past accused ALO violations are covered in other parts of the new ordinance, and with an appeals process to ERC and Council any truly unique scenarios can be considered by accountable public officials, not staff. This provision should either be significantly clarified or eliminated altogether.

Replace disqualification for “similar” projects with a disqualification for the SAME project.

“Similar” is an ambiguous term that could be interpreted to allow staff to disqualify firms from bidding on different services that are nonetheless “similar” to one from which a bidder was disqualified.

Continue to keep the Anti-lobby Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council.

We actually support allowing the ALO to be adopted and put into place prior to the adoption of rules so long as the rulemaking process is underway. We do not believe that it is wise whatsoever to impose the current ALO onto contracts that already saw their procurement processes run aground because of this very ordinance.



From: Donna Gosh 

Sent: Wednesday, October 11, 2017 10:05 AM

To: Einhorn, Peter - BC; Stratmann, Robert - BC; Harding, Meagan - BC; Danburg, Debra - BC; Holmes, Fredda - BC; Kahle, Mary - BC; McCormick, Donna Beth - BC; Ohueri, J Michael - BC; Soberon, Luis - BC; Speight, Dennis - BC; Thompson, Brian - BC

Subject: Anti- Lobby Ordinance Agenda Item

Dear Ethics Commission.

We participated in the waste working group during April and May. One of the major topics of this working group was the Anti-Lobby Ordinance (ALO). Attached you will find our thoughts from this working group.

The ALO drafted by the purchasing office is on your agenda this evening for review. We do not feel this draft fully reflects the majority consensus in the working group. Two major items stand out:

1. The "No Contact Period" in the draft begins on the date the bids are submitted. We disagree with this time line. It is important the "No Contact Period" begin when the solicitation is issued to prevent lobbying during the solicitation period.
2. The removal of disbarment provision. Those choosing to remove this provision argue that it has never had to be utilized and was simply a deterrent. Our response to this is that it must be working as a deterrent if it has never had to be utilized. We encourage keeping the provision as part of the ALO

The goal of the ALO is to provide an equitable, competitive and collaborative environment for companies to prepare and submit solicitations. It is important to have a system that encourages and fosters small business and new entrepreneurs / start-up companies to enter the market and compete on a level playing field.

We appreciate your time and consideration.

Phil Gosh



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[REDACTED]

[REDACTED]



WORKING GROUP INSIGHTS AND SUGGESTIONS

The waste management working group has discussed the need for an anti-lobbying ordinance and protection of confidentiality, and the importance of competition.

Power exists when we all work together and utilize the many experts and vast experience in Austin's waste and recycling community. Diversity, collaboration and competition are healthy and provide an opportunity for multiple businesses to participate and offer pricing and service options to the City. In this spirit of competition, do we want to draw more businesses to the City of Austin and increase the diversity and collaboration of businesses? And do we want to promote small businesses and entrepreneurs in Austin's zero waste movement?

If so, it is important to have commitment to create an environment in which:

1. Politics is secondary to obtaining and communicating information and enforcing policy, verifying information and trusting city staff;
 2. Mutual respect exists in collaborating toward zero waste;
 3. New businesses and entrepreneurs can enter the market and thrive;
 4. City Council, city staff, and advisory boards work well together modeling trust and collaboration;
 5. A competitive solicitation is respected through the process and enforcement of not allowing non-solicitors to derail the process; and
 6. Confidentiality is respected in pre-meetings and advisory meetings with enforceable confidentiality agreements signed by all parties.
- A. The Anti-Lobby Ordinance is a good and necessary policy. As stated at recent city council meetings and ZWAC meetings, the ordinance exists to minimize corruption. This is key to a healthy environment to promote local business competition and to prevent monopoly and corruption. A level playing field needs to be fostered with guidelines to protect businesses who respond to solicitations from those who choose not to respond or abide by the ordinance guidelines.

Ideas on tweaking the Anti-Lobby Ordinance so that boundaries and limitations are clear, strong, and enforced. The Anti-Lobby Ordinance should:

1. Specify in the ordinance that it applies to all waste and recycling service solicitations;
2. Define "Representation" to include
 - a. contact initiated by respondent or its representative, city official, city employee, or city representative;
 - b. advance the interest of the respondent
 - c. discredit the response of any other respondent
 - d. encourage the city to withdraw the solicitation or reject all of the responses;
 - e. directly or indirectly ask, influence or persuade any City official, City employee, or body in any manner regarding the solicitation or other respondents;
3. Define the "no contact period" to be effective from the date a solicitation is released until contract(s) awarded and executed or when solicitation is withdrawn;
4. Be applicable to all respondents during the entire "no contact period".



WORKING GROUP INSIGHTS AND SUGGESTIONS

5. If a vendor's solicitation is not recommended, the ordinance should still apply to them until a contract is awarded and executed to prevent derailment of the process and discrediting of responses and other respondents as happened this past year on multiple solicitations;
6. Clarify that if a vendor makes a representation during the "no contact period" then they cannot later participate in the solicitation and be a respondent;
7. Support transparency thus include that all representations other than procedural questions should be limited to publicly posted meetings held under the Texas Government Code, Chapter 551 (Open Meetings Act);
8. Incorporate a violation inquiry channel and panel for reporting complaints and violations. This would create an objective avenue to file complaints or make inquiries as to the ordinance and policy conflicts. Perhaps the existing ethics commission could be utilized to receive email of complaints or questions, investigating if they are valid and communicating conclusion to involved parties and if violation exist, recommending action. It seems fair to have 1-2 warnings before issuing a violation; so, clarify how violations will be tallied. The ethics commission should have the ability to enforce actions on complaints and violations.
9. Multiple violations would result in disbarment from solicitation process if vendor has more than 2 violations that occur during a 5-year period. Violations are a serious matter and harmful to healthy collaboration and competition to reach zero waste.

Prior to releasing a solicitation, it would be helpful for the city receive input from advisory commissions on scoring matrix and items that would be important to clarify in the solicitation. This would reduce anti-lobby violations if the solicitation was very clear on details of service parameters and scoring.

If clear policy is in place for a solicitation process, then only those who participate in following the process should be considered for awarding the contract. It is important for the city to have clear policy that applies to all with accountability and power to enforce. Clear solicitation process and anti-lobbying boundaries enforced without exceptions. Our experience of transparency without the anti-lobbying enforced and disclosure of confidential information has not been healthy or productive. There must be a limitation on lobbying by all respondents during the entire no-contact period if the experience of this past 9 months is to not be repeated.

An anti-lobbying ordinance is critical to foster an environment for entrepreneurs and new businesses to enter as stated at the April 6 city council meeting by SCORE representative. A start-up business does not have the time, energy, or capital to spend on lobbying and legal advice. Therefore, a level playing field where companies can thrive and grow and participate in solicitations without lobbying or defending frivolous accusations and incomplete information.

- B. ZWAC participation to review scope of work in solicitations and offer input before they are distributed to vendors is a good idea, but there needs to be an enforceable confidentiality to not share information on solicitations with vendors or obtain vendor input on solicitations.



WORKING GROUP INSIGHTS AND SUGGESTIONS

- C. From our experience, a pre-solicitation meeting is held allowing all vendors to participate and ask questions about the scope of work. This has been helpful and a good practice to continue.
- D. Construct a scoring matrix for solicitations that is based on historical perspective as well as current solicitation parameters.
 - 1. Collaboration with others in industry
 - 2. Ethics
 - 3. Integrity
 - 4. Reputation with peers and employees
 - 5. Previous Contract Compliance
 - 6. Commitment to Zero Waste Goals
 - 7. Local Business (need to be clear on definition)
 - 8. Generous with others, sacrifice to greater good
 - 9. Solution Based / Problem Solver not creator
 - 10. Conflict Resolution with city staff, peers, competition (i.e. limit legal action)
 - 11. Communication – clear and transparent
- E. Proper handling of confidential information in solicitations and contracts is critical to healthy competition. A solution would be to choose carefully what is required in solicitations, request only information that is absolutely necessary and relevant. Allow vendors the option to redact anything proprietary (financial, trade secret, etc.) before a solicitation is provided outside of the purchasing office. The public should not be allowed to view submitted solicitations and/or unexecuted contracts. A Public Information Act exists to provide govern the release of information. It is not conducive to healthy competition when confidential financial or proprietary information is released and allowed to be viewed by public or competitors.
- F. Existing contract utilization for new solicitation items should be avoided except in emergency situations. Issuance of a new solicitation would be healthy for competition and obtaining best value / service. Contracts are based on a scope of work in the solicitation and if a blanket clause in an existing contract is utilized, then it would not be fair to those who were not able to participate in original solicitation based on its scope of work. A new solicitation would allow others to respond that may not have responded to the solicitation for the existing contract because they did qualify for the original scope of work. Competition is important and having one business simply add things to an existing contract via a "blanket clause" would create a monopoly. For example, if a business is capable of providing multiple service, they could simply put a "blanket clause" in every contract to argue its use for every future solicitation. Whereas, a business that provides limited service may not have been able to bid on the existing contract because they did not provide the service in its scope of work, but may provide the service for the scope of work being added. Healthy competition is the goal.
- G. Directing product to or away from certain landfills in future solicitations should be based on whether the landfill is compliant with federal and state requirements. All of the facts need to be considered on landfills – what type of liner, is methane captured to produce energy, is all testing current.



Organics "By Gosh"

WORKING GROUP INSIGHTS AND SUGGESTIONS

In addition, we need another landfill available. As was discussed in the first working group session, the objective is to avoid monopoly and encourage competition. Multiple landfills will promote competition and pricing; as well as provide alternatives and contingency plans in the event of an emergency.

- H. A preferred policy for biosolids management requires obtaining all the information from city staff and waste water as they are the experts. They have worked with current contractor for about 9 years and have all of the backup data and lab analysis. A diversity for use of compost is important. Please get all of the facts and focus on the complete truth.

Let's focus on the vision of zero waste set before us, working together, trusting each other, sacrificing for the good of the community. And foremost, let's abide by policy and stop the politics so we can make sound decisions for future generations, "By Gosh"!



From: Meade, Nikelle 

Sent: Wednesday, October 11, 2017 2:18 PM

To: Einhorn, Peter - BC; Stratmann, Robert - BC; Harding, Meagan - BC; Danburg, Debra - BC; Holmes, Fredda - BC; Kahle, Mary - BC; McCormick, Donna Beth - BC; Ohueri, J Michael - BC; Soberon, Luis - BC; Speight, Dennis - BC; Thompson, Brian - BC

Subject: Item 3.b.- Anti-Lobbying Ordinance Proposed Amendments - Support Staff Recommendation

This email concerns **Item 3.b.** on your agenda tonight, which is the proposal to amend the anti-lobbying ordinance related to public contract procurements. **We are writing to express support for the staff's recommendation** but to provide two comments for your consideration:

1. With regard to Section 2-7-102 (5) (Definition of "No Contact Period"), we believe the No Contact Period should begin on the date the Solicitation is published rather than on the proposal due date. Because the purpose of the anti-lobbying provisions is to ensure that no single proposed vendor has undue influence with regard to a solicitation and that information regarding the solicitation is distributed transparently to all bidders within the same timeframe and in the same manner. Allowing lobbying during the solicitations cuts directly against these goals since doing so will make it impossible to know what information about the solicitation is being given to individual vendors and their lobbyists.
2. Secondly, although we understand that additional effort will have to be put into enforcement, we believe it is imperative for this ordinance to prohibit lobbying activity by those who choose to not "formally" participate in a particular procurement by submitting a proposal or bid but who, instead, seek the work by other means or avenues, such as amendments to existing contracts and submittal of unsolicited proposals. So long as this type of "lobbying" is not prohibited, the legitimacy of the City's procurement processes will be compromised and transparency will be thrown out the window.

We understand that one vendor does not support the staff recommendation and is requesting changes to these regulations that would be so significant that they would more or less obliterate any meaningful restrictions against outright lobbying to secure public contracts – in particular those contracts related to waste management services. There is no valid reason to make such significant changes. For years, our firm has worked with many clients that are seeking public contracts at the local, state, and federal levels all over the country. It is essentially unheard of that these public processes don't restrict vendors' contacts with the staff and elected officials of the governmental entities while the governmental entities are reviewing the merits of the proposals and making a selection. Our clients always expect to see these regulations, are completely fine working within the

limitations of these regulations and fully abiding by them, and actually support these regulations because they result in clean, transparent, above-board selection processes. So, we believe the changes proposed by the city staff are reasonable, but we would ask the Commission to *not* support any ordinance provisions that are less restrictive than the staff's proposal.

For these reasons, **we ask the Commission to support Staff's proposed amendments or a request more restrictive regulations.** If the Commission believes that some of the alternative recommendations from vendors have any merit, we hope that the Commission will take additional time to fully explore the impact of the recommendations before adding provisions to the ordinance that could prove to be detrimental to the integrity and transparency of the City's procurement processes.

Thank you for your work on this important issue, and we appreciate your consideration of our comments.

Nikelle Meade
Partner

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Named a first-tier national real estate law firm by U.S. News-Best Lawyers in 2017

[REDACTED]

[REDACTED]

Bob Gregory

Subject: FW: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

From: Whellan, Michael [mailto:MWhellan@gdhm.com]

Sent: Friday, October 27, 2017 6:55 PM

To: Bob Gregory <bgregory@texasdisposal.com>; Adam Gregory <agregory@texasdisposal.com>; Ryan Hobbs <rhobbs@texasdisposal.com>; Gary Newton <gnewton@texasdisposal.com>; Mark Nathan <mark@citylightsgroup.com>; David Butts <djbutts@sbcglobal.net>; Hemphill, Jim <JHemphill@gdhm.com>

Cc: Whellan, Michael <MWhellan@gdhm.com>

Subject: FW: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

Fyi.

MJW.

From: Andrew Dobbs [mailto:dobbs@texasenvironment.org]

Sent: Friday, October 27, 2017 5:32 PM

To: Meade, Nikelle; 'Einhorn, Peter - BC'; 'Ohueri, J Michael - BC'; 'Kahle, Mary - BC'; 'Holmes, Fredda - BC'; 'Danburg, Debra - BC'

Cc: 'Tom, Cynthia'; 'Smith, Amy'; 'Scarboro, James'; 'Weema, Chris'; 'Palmer, Sue'; 'GErwin@spartnerships.com'; 'bcorbett@spartnerships.com'; Whellan, Michael; 'Gay Erwin (GErwin@spartnerships.com)'; 'Beth Corbett (bcorbett@spartnerships.com)'; 'jackie.goodman@austintexas.gov'; 'alba.sereno@austintexas.gov'; 'ken.craig@austintexas.gov'

Subject: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

October 27, 2017

Commissioners:

As promised, here is my analysis of where the positions of the various parties are with reference to the ZWAC recommendations laid out on October 11. In this analysis I am suggesting some possible compromises that may bring us closer to a resolution to this important and challenging issue. These do not, of course, reflect the input of parties that have not yet weighed in, but should help clarify where things stand prior to their engagement.

Areas of Consensus or Near Consensus

Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.

There is consensus that some sort of appeal to an authority outside of the Purchasing Department is advisable. Ms. Meade has objected to allowing an appeal to Council, and you all indicated a wariness to make ERC the body to consider the appeals. TCE does support allowing an appeal to Council, but more fundamentally we believe that some sort of appeal to a non-staff body is the key point here. We are okay with some other appointed body serving this role as opposed to the ERC, but we oppose any process that will keep the power to review in the hands of staff only.

Clarification that only Council may void a contract for violation for the ALO.

This is an area of flat consensus between the parties that have presented their positions to date.

Replace disqualification for “similar” projects with a disqualification for the SAME project.

This is an area of near consensus, with the concept apparently acceptable to all even if the mechanisms for doing so in the code being disputed. Ms. Meade proposed language to the effect of “same project or a project with a substantially similar scope of work.” While some of these terms are open to interpretation an independent appeals process should minimize the risk of abuse.

Areas Not Addressed or of Ambiguous Status

A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.

This is not addressed in either Mr. Whellan’s or Ms. Meade’s documents. That said, no sides have to date objected to the idea that administrative rules should be subject to public approval, and we urge you to include this recommendation so that we avoid confusion and unnecessary conflicts in the future.

Definition of the term “response.”

TDS’ proposed changes to the definition proposed by staff were substantially agreed to by Ms. Meade with the insistence that the phrase “provide the goods or services solicited by the City” be kept in place. We hope that this will be acceptable to all parties, and with other protections introduced so far this suggestion from ZWAC may not be as significant as it would be under the present ALO, where this ambiguity has been abused in the past.

Assurance that the ordinance will not consider public communications to be in any way a violation.

This is a topic that has been addressed and agreed to in some ways, disagreed to in others, and unaddressed in yet others. All sides agree that statements to the media should be exempted from the ALO. As for protections that explicitly protect communications at public commission or Council meetings, this is still absent from the proposed document and nobody has expressed any objections to this so far. Finally, Ms. Meade objected to the inclusion of “business groups or advocacy groups” in permitted communications.

Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.

All sides agree that organizations without any relationships to respondents are free to advocate. Ms. Meade both wants disclosure for any entities that receive contributions from respondents and opposes any explicit carve outs for this sort of behavior. We support an explicit guarantee of the right of non-profit groups to advocate on contracts. Although non-profit groups by federal law do not have to reveal their funding sources, a limited disclosure of relationships could be workable.

Clarification of subjective terms such as “influences,” “persuades,” “advance the interests,” or “discredit.” At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.

This has not been specifically addressed by the sides weighing in thus far. Ms. Meade did object to striking the term “indirectly” in sections using some of these terms, but expressed no problems with eliminating “influences” and “persuades.” She appears to have no objection to striking “advance the interests” and “discredit,” though she may also be suggesting that these could be the call of the appellate body for the ordinance. We recommend striking these subjective terms for the sake of strict clarity in the ordinance.

Areas of Remaining Disagreement

Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.

Ms. Meade says that they object to striking this provision, but then goes on to say that ERC (or, presumably, any entity appealed to) should have the ability to consider these factors. It strikes us as inappropriate for staff to unilaterally determine that a violation should NOT be considered because of undefined “mitigating factors,” since this non-decision cannot be appealed as far as we can tell. It may make sense to empower ERC to consider such factors, but even this may be problematic. With the revisions at hand the ordinance is essentially unambiguous, and those that violate its simple standards should not be subjectively granted passes to disregard City rules.

Striking all sections which empower staff to require recusal of elected or appointed City officials.

This is an area of substantial and significant disagreement. It seems appropriate to us to include somewhere in the ordinance an explicit prohibition on staff and other officials from contacting respondents (to supplement the existing prohibition on communications in the other direction--respondents contacting staff or Council), as well as some mechanism for recording such incidents if they do occur. What is totally inappropriate is any power given to City staff to direct elected officials or their appointments to compel recusal. It is likewise not appropriate for appointed officials to be able to compel elected officials in this way.

Some sort of authorization to publicly recommend recusal may be appropriate with elected and appointed officials able to determine whether they will comply with or reject this recommendation. But an imbalance between the powers of staff and Council is what brought us to this point; we need to prevent a new path for the same mistake.

Previously Addressed Areas Now Contested

Debarment as a Penalty

Staff's present draft revisions to the ordinance and their policy proposals earlier in the Council Working Group process had eliminated debarment as a possible penalty. There are a number of cities that rely only upon disqualification only as a penalty and do not provide for debarment. We see no reason to go back on this topic.

Beginning and Ending Points for the Restricted/No Contact Period

Staff's draft of the ALO revisions began the Restricted Contact Period after the close of the solicitation and ends it with either the cancellation of the process, the successful execution of the contract or sixty days after Council authorization to negotiate with the selected vendor. We believe that this starting point is the most appropriate, as it allows for advocacy in the instance that a proposed contract reflects bad policy or staff departure from policy. If the process begins when the solicitation opens it forces potential vendors to either go along with bad policy or to surrender their rights to bid. These are the very companies we want bidding the most, and the policy design being proposed now makes that the most likely.

As for the ending point, we see a great deal of benefit in allowing some advocacy in the period between the vendor being chosen and before it is finally decided upon by Council. Again, if the chosen contract departs from policy or reflects a bad expression of existing policy the people most likely to spot this may be firms involved in that industry and their voices could be of great benefit for the public interest.

As for the concept of a “Notice of Solicitation” before the solicitation is issued, this is better than status quo for sure, but there have been numerous concrete instances of solicitations changing between their initial design and their final issuance. Mr. Scarboro himself acknowledged the “iterative” nature of this process, so this notice seems insufficient to accomplish the goals suggested above.

Recommended Recommendation

If you wanted to make a recommendation to Council that reflects the areas of consensus or non-objection to this point you could say something to the effect of:

"The Ethics Review Commission recommends that the Austin City Council adopt proposed changes to the Anti-Lobbying Ordinance (ALO) with the following amendments:

- A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.
- A guaranteed appeals process for all penalized violations to a board appointed by the Council.
- Clarification that only Council may void a contract for violation for the ALO.
- Clarification that disqualification only applies to solicitations for the same project or a project with a substantially similar scope of work."

If you wanted to include our suggested recommendations for the areas of ambiguity, you could add:

- Amendment of the definition of "Response" to read "only the contents of a sealed proposal or bid submitted by an offeror replying to a solicitation to provide the goods or services solicited by the City."
- Exemption for communications made in public meetings or to the media.
- Exemption for independent advocacy from non-respondents from being used to disqualify respondents.
- Elimination of subjective terms such as "influences," "persuades," "advance the interests," or "discredit."

Our suggestions for the areas that have not been agreed to yet or that remain areas of contention would be:

- Eliminate or delineate the power of purchasing officers to determine "mitigating factors" in violations.
- Striking all sections which empower staff to require recusal of elected or appointed City officials.
- Ending the Restricted Contact Period at some point before Council has voted to authorize the contract under consideration.

We do not at this time recommend any other specific recommendations.

Thank you again for your service on this important commission and your work so far. We look forward to the outcome of this difficult process, and are happy to answer any questions you may have on this or other topics.

Sincerely Yours,

Andrew Dobbs
Central Texas Program Director
Legislative Director
Texas Campaign for the Environment
(512) 326-5655
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From: Whellan, Michael [REDACTED]
Sent: Wednesday, October 4, 2017 4:25 PM
To: Einhorn, Peter - BC
Cc: Whellan, Michael
Subject: Anti-Lobbying Ordinance - 10/11 ERC Agenda

See below and attached.

MJW.

Michael J. Whellan
Direct: 512.480.5734
Facsimile: 512.480.5834
E-mail: [REDACTED]



GRAVES DOUGHERTY HEARON & MOODY

401 Congress Avenue, Suite 2200
Austin, Texas 78701
Phone: 512.480.5600
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From: Bob Gregory [REDACTED]
Sent: Thursday, September 28, 2017 10:36 AM
To: steve.adler@austintexas.gov; kathie.tovo@austintexas.gov; ora.houston@austintexas.gov; delia.garza@austintexas.gov; sabino.renteria@austintexas.gov; greg.casar@austintexas.gov; ann.kitchen@austintexas.gov; jimmy.flannigan@austintexas.gov; leslie.pool@austintexas.gov; ellen.troxclair@austintexas.gov; alison.alter@austintexas.gov; Jim.Wick@austintexas.gov; Amy.Everhart@austintexas.gov; amy.smith@austintexas.gov; shannon.halley@austintexas.gov; david.chincanchan@austintexas.gov; ken.craig@austintexas.gov; Marti.bier@austintexas.gov; michael.searle@austintexas.gov; kurt.cadena-mitchell@austintexas.gov; cj.hutchins@austintexas.gov; geno.rodriguez@austintexas.gov; katherine.nicely@austintexas.gov; neesha.dave@austintexas.gov; donna.tiemann@austintexas.gov; john.lawler@austintexas.gov; Lesley.varghese@austintexas.gov; Louisa.Brinsmade@austintexas.gov; Jackie.Goodman@austintexas.gov; cecil.gratias@austintexas.gov; Shelby.Alexander@austintexas.gov; Joi.Harden@austintexas.gov; Ashley.richardson@austintexas.gov; alba.sereno@austintexas.gov
Cc: bc-gerard.acuna@austintexas.gov; Bc-cathy.gattuso@austintexas.gov; bc-joshua.blaine@austintexas.gov; bc-kendra.bones@austintexas.gov; bc-stacy.guidry@austintexas.gov; bc-heather-nicole.hoffman@austintexas.gov; bc-shana.joyce@austintexas.gov; bc-amanda.masino@austintexas.gov; bc-ricardo.rojo@austintexas.gov; [1](mailto:bc-</p></div><div data-bbox=)

kaiba.white@austintexas.gov; bc-b.christopher@austintexas.gov; Whellan, Michael; Gary Newton; Ryan Hobbs; Adam Gregory; Mark Nathan; [REDACTED]; Hemphill, Jim
Subject: Agenda Item 44, TDS Response and Comments

Dear Mayor Adler & Council Members:

As noted in our [9-26-17 email](#), TDS is requesting that the Austin City Council please postpone consideration of Item #44, a City management-proposed revision to the Anti-Lobbying Ordinance (ALO), until such time as the Waste Management Policy Working Group process unanimously established by the Council in [Ordinance 20170323-055](#) has been completed.

As a reminder, Council's unanimous vote and [dais discussion](#) on 3-23-17 clearly established the expectation that the recommendations of the Waste Management Policy Working Group would be presented to the Zero Waste Advisory Commission (ZWAC) and other appropriate boards and commissions prior to Council consideration.

As noted, TDS is also alarmed by Item #44's seeming disregard for the subsequent process [recommendations](#) of the Working Group itself, which both urged additional input from community stakeholders regarding proposed revisions to the ALO – which has not happened – and proposed that administrative rules for the revised ALO be presented to and approved by Council along with the draft ordinance – which also has not happened.

While executive City staff from Austin Water have urged immediate Council consideration of proposed revisions to the ALO without regard to the Working Group process in order to facilitate the release of a pending solicitation for biosolids management, there is in fact no urgency. The current vendor's contract extends until April 2018 – seven more months – leaving ample time to allow an appropriate public process to continue; alternatively, Austin Water could simply choose to issue the biosolids management solicitation without the ALO in effect (there are only two likely respondents to the solicitation, both of whom are well known to Council and management). It would NOT be necessary to extend the current vendor's contract to accommodate postponement until the Working Group process is complete. Please also know, if Council desires to do so, the City and TDS can easily amend the existing long term Waste Disposal and Yard Trimmings Processing Contract to have TDS do 100% of the City's biosolids composting. TDS can mobilize and fully take over the City's biosolids composting program with as little as two weeks' notice.

Nonetheless, as it appears based on Council's consent agenda vote this morning that you in fact intend to proceed with taking up Item #44 today, I am reluctantly bypassing (but copying) ZWAC and other board/commission members and writing to present TDS' analysis, concerns and recommendations with regard to the proposed revised ALO ordinance directly to the Council.

Overall, the proposed ALO revisions as drafted by City management fall far short of resolving the concerns that led TDS to discontinue responding to City waste solicitations in 2015, and would not change TDS' position on responding to future solicitations.

To be clear, as we have shared with you many times before, TDS' central concerns have been and remain centered around City management's subjective interpretation of broad, vague language in the ALO and resulting misuse of the ordinance to achieve strategic, competitive objectives in the waste marketplace. This includes an illegal ALO disqualification of TDS in 2009 that was later overturned by a federal judge, as well as last year's effort – ultimately rejected by Council – to allow Synagro to circumvent the ALO by holding private meetings with City officials during a solicitation process.

TDS has also been deeply unsettled by City management's misuse of the broad no-contact provisions in the current ALO to effectively silence criticism of City waste solicitations and proposed City waste contracts on an ongoing basis. As per the [document](#) we presented during the Waste Management Working Group process, over a span of nearly 8 years beginning in Nov. 2009, there have been only two brief periods, totaling just 56 days, where there were no ALO no-contact restrictions in place for solid waste, recycling or organics management solicitations.

During the Working Group process, TDS has advanced the following proposed policy position with regard to the ALO:

The City should exempt waste contracts from the ALO. Alternatively, the ALO should be revised to go into effect no sooner than 14 days after each solicitation is issued and no later than 14 days before each proposed contract is posted for consideration by either a City board or commission or the City Council; to eliminate debarment; to apply only to communications specific to solicitation responses; and to allow appeal to both the Ethics Review Commission and the City Council as well as state or federal district court. If debarment is not eliminated, it should be made to apply only to future solicitations and contracts.

Unfortunately, City management's proposed revised ordinance not only fails to accomplish most of these reasonable goals but also leaves in place ambiguous ordinance language that will continue to empower staff to interpret the ALO with the same level of motivated subjectivity as before, and no independent oversight.

Further, it is clear that City management's proposed revised ALO ordinance also raises a range of First Amendment concerns. As you know, any restriction on the First Amendment's free speech clause must be narrowly drawn to avoid limiting speech beyond what is necessary to achieve the intent of the restriction. Restrictions must also include "fair notice" (i.e. clear and precise terms defining the restricted speech) and provide adequate alternative forms of communication.

Accordingly, we have attached TWO important documents for your immediate review – a legal analysis of City management's proposed revised ALO ordinance vis-à-vis First Amendment concerns; and TDS' redline revision to City management's proposed revised ALO, which reflects both our First Amendments concerns AND our policy recommendations.

Finally, please note that we are troubled by the extent to which the "Comparison Matrix" provided to Council by City management as an analytical tool does not accurately reflect the substance of the proposed ordinance but in fact offers mostly favorable examples of how staff could interpret the language. Once again, City staff has clearly demonstrated a disposition to interpret the ALO inconsistently and in ways detrimental to those who raise concerns about City management's efforts to advance their competitive interests in the waste management marketplace.

In sum, TDS believes that City management's demonstrated history of subjective interpretation and misuse of the ALO, particularly as it relates to waste, recycling and organics management, warrants the full exemption of waste contracts from the ALO. Alternatively, revisions to the ALO should leave no room for subjectivity or abuse moving forward but instead be based on unambiguous language and independent oversight, as well as narrow, defensible restrictions on constitutionally protected speech. TDS calls on Council to please act accordingly should you in fact proceed today with considering City management's proposed revised ALO rather than honoring the original Working Group process.

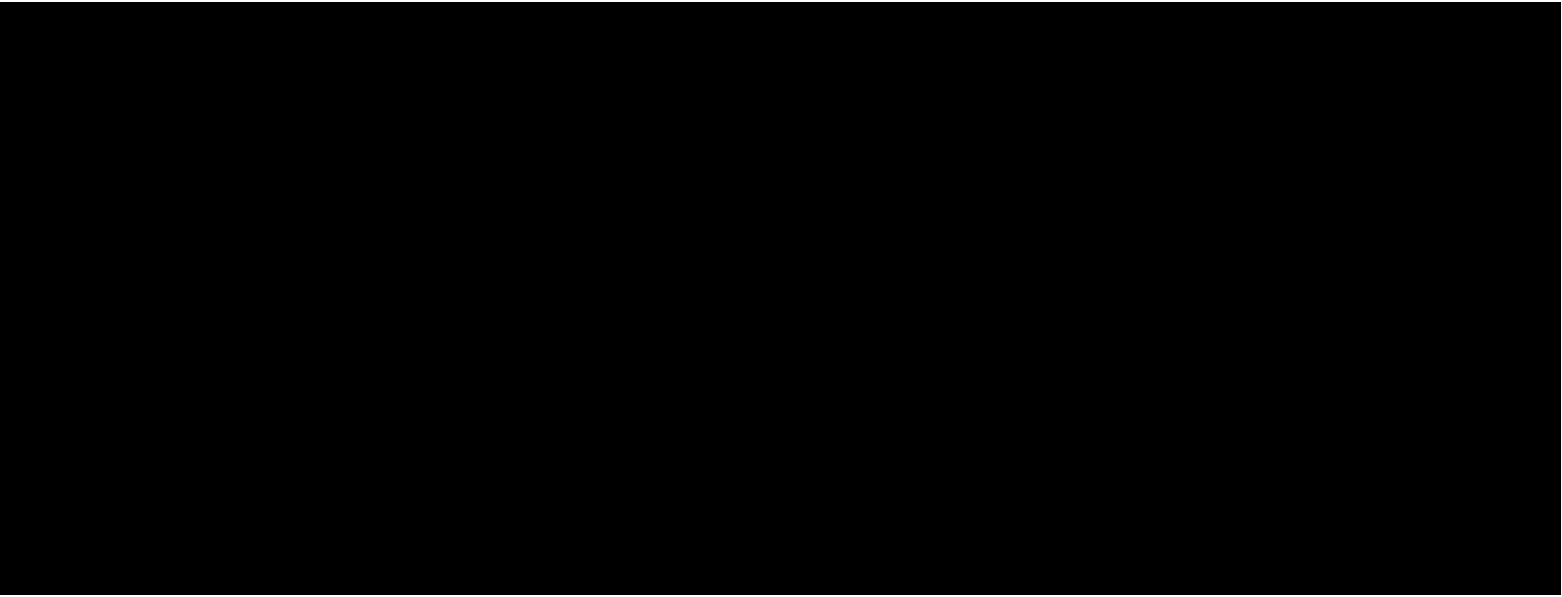
Thank you for your attention to this important issue. Please do not hesitate to contact me directly with questions or concerns.

Sincerely,
Bob Gregory
President & CEO
Texas Disposal Systems
512-619-9127

communication or any attached document is strictly prohibited. If you have received this communication in error, please notify the sender immediately by reply e-mail and promptly destroy all electronic and printed copies of this communication and any attached document.

[REDACTED]

[REDACTED]



From: Bob Gregory [REDACTED]

Sent: Friday, October 6, 2017 9:33 PM

To: Einhorn, Peter - BC; Stratmann, Robert - BC; Harding, Meagan - BC; Danburg, Debra - BC; Holmes, Fredda - BC; Kahle, Mary - BC; McCormick, Donna Beth - BC; Ohueri, J Michael - BC; Soberon, Luis - BC; Speight, Dennis - BC; Thompson, Brian - BC

Cc: [REDACTED]; [REDACTED]; Mark Nathan; Gary Newton; Ryan Hobbs; Adam Gregory

Subject: Ethics Review Commission Agenda Item 3b – CRITICAL review of proposed revisions to Austin’s Anti-Lobbying Ordinance

Chair Einhorn, Vice Chair Harding and members of the Ethics Review Commission:

Thank you very much for your service on the Ethics Review Commission (ERC). As you may know, the [Austin City Council voted on 9/28/17](#) to request that City staff-proposed revisions to the City of Austin’s Anti-Lobbying Ordinance (ALO) be reviewed by the ERC before further review by Council. The ALO review appears as Item 3b on your [10/11/17 meeting agenda](#).

The recommendation to [revise the ALO originated with a City Council committee](#) – the Waste Management Policy Working Group – [created by Council on 3/23/17](#), to review the City’s waste, recycling and organics policies and contracting practices after all staff-proposed waste contracts presented to City Council in 2016 were rejected. Revising the ALO was one of eight other [Working Group recommendations](#) to advance the City’s “Zero Waste” goals developed after a series of meetings with waste services providers and community stakeholders. (Please note that, per Council, the Zero Waste Advisory Commission will also review the proposed ALO revisions, as well as the other Working Group recommendations, also on 10/11/17.)

[Texas Disposal Systems](#) (TDS), the City of Austin’s most relied-upon waste services provider over the past 20 years and a Working Group [stakeholder](#), has actively participated in the recent Council and [Working Group dialogue](#) related to City waste policies and contracting. In doing so, we have consistently advocated for, among other things, revising the broad, vague and severely punitive ALO, including adding citizen and Council oversight to ensure fairness and transparency.

Unfortunately, City staff’s proposed revision to the ALO fails to satisfy TDS’ driving concern that the ordinance’s ambiguous, open-ended language – as well as the still-missing proposed administrative rules requested by the Working Group – will continue to allow City staff a range of interpretation that includes infringement on free speech rights granted by the U.S. Constitution and the ability to inappropriately disqualify contractors, or to deem as acceptable violations committed by preferred contractors.

To be clear, TDS' position in favor of revising the ALO stems first and foremost from the unique conflict inherent in City staff's dual role as waste services industry regulator and industry competitor – a conflict specifically acknowledged in City staff's [2/15/17 "Policy Considerations" memorandum to City Council](#), which notes that the City's current practice of providing waste services to special events "competes with private haulers." (City staff regularly utilizes contracted "toll haulers" to provide a full range of waste-related services – including trash, recycling, composting, and portable toilets – to Austin special events, [often for free](#), in direct competition with non-contracted private waste services providers, including TDS, and in direct conflict with [city code](#) prohibiting commercial competition.)

In addition, in 2010, City staff pursued a plan to compete directly with City-licensed private waste providers for the provision of recycling processing services, spending over \$100,000 to secretly prepare and submit an internal bid in response to a City of Austin solicitation for development of a Materials Recovery Facility (MRF), while at the same time [utilizing the ALO to attempt to disqualify TDS from responding to the same solicitation](#) – a disqualification that was later [rebuked as "improper" and "unsupported" by U.S. District Court Judge Lee Yeakel and ordered reversed](#). (Demonstrating the absurd range of interpretations allowed by the current ordinance and capitalized on by City staff in pursuit of competitive objectives in the waste management marketplace, Howard Lazarus, then Director of Public Works, in submitting the City's internal bid to the City, signed the required ALO certification indicating that City staff had not communicated with and would not communicate with City staff or City officials during the RFP response review, scoring, and presentation to boards and commissions and to City Council; something not possible to accomplish. Staff even scored their own RFP response as third, behind those of Republic Waste and Waste Management, Inc.)

Even now, given the broad authority that Austin and municipalities across the state and country have to regulate and control the provision and pricing of many waste services (note, for example, the [City of Los Angeles' controversial ongoing takeover of much of L.A.'s commercial waste services](#)), the prospect of competitive conflict between City staff and licensed local waste services providers like TDS is and will remain ongoing, raising concerns about the potential for staff abuse of the ALO, which is essentially a 'gag order' against all competitors – again, other than City staff – under the penalty of debarment, with no independent oversight or ability to appeal.

Indeed, TDS has grown increasingly alarmed since the 2008 arrival in Austin of Assistant City Manager Robert Goode to witness City staff's misuse of the "no-contact" provisions in the current ALO to effectively silence criticism, quash questions and withhold information from Council about waste contracts and policies. As per [the document TDS presented to the Waste Management Policy Working Group](#) this summer, over a span of nearly 8 years beginning in Nov. 2009, there have been only two brief periods – totaling just 56 days – where there were no ALO "no-contact" restrictions in place for solid waste, recycling or organics management solicitations. In other words, if TDS had responded to every waste-related solicitation over the past 8 years, we would have been prohibited from speaking with City officials about most waste-related issues for nearly the full length of that time – not only a plainly overbroad infringement on free speech, but also an absurdly impractical restriction given TDS' numerous City waste contracts and TDS services capable of responding to all of these solicitations.

Overall, TDS' years of experience with City staff's oversight-free interpretation and enforcement of the ALO has led us to the inescapable conclusion that the ordinance's vague and broad provisions and penalties have been abused – especially as it relates to solid waste, recycling and organics management solicitations – to achieve staff's competitive objectives and punish those who raise concerns with the City Council or other concerned stakeholders.

For these and other reasons – including the existential risk to our business associated with a possible staff-imposed ALO debarment and resulting termination of our City contracts, among them a 30-year contract for waste disposal and yard trimmings processing, and a 20-year contract for recyclables processing and marketing – **TDS determined in 2015 that we could no longer respond to City waste solicitations under the current ALO as interpreted and administered by City staff.**

Because TDS is unique among private local waste services providers in terms of offering a full range of processing and disposal services and state-permitted facilities needed to help the City and Austin community achieve "Zero Waste" goals, TDS' difficult decision to forgo responding to City solicitations understandably created concern among City officials

and community stakeholders, which in turn helped result in the creation of the Waste Management Policy Working Group.

Accordingly, as noted, TDS actively participated in the [Working Group process](#), advancing a range of policy proposals across each of the committee's review areas, including the following proposal regarding revision of the ALO:

The City should exempt waste contracts from the ALO. Alternatively, the ALO should be revised to go into effect no sooner than 14 days after each solicitation is issued and end no later than 14 days before each proposed contract is posted for consideration by either a City board or commission or the City Council; to eliminate debarment; to apply only to communications specific to solicitation responses; and to allow appeal to both the Ethics Review Commission and the City Council as well as state or federal district court. If debarment is not eliminated, it should be made to apply only to future solicitations and contracts.

While the final Working Group recommendation ultimately indicated support for many of these proposed revisions, City staff's resulting proposed revised ALO unfortunately not only failed to include key reforms but also left in place – and in some places inserted anew – overly broad and ambiguous ordinance language that TDS believes will continue to empower staff to interpret the ALO with the same level of motivated subjectivity as before, and still with no independent oversight.

TDS is also troubled by the extent to which the "[Comparison Matrix](#)" developed by City staff as an analytical tool does not accurately reflect the substance of the proposed revised ALO but in fact offers mostly favorable examples of how staff could interpret the proposed language. Once again, City staff has demonstrated a disposition to interpret the ALO in whatever way advances staff's interests.

Further, it is clear that City staff's proposed revised ALO ordinance also raises a range of serious First Amendment concerns. As you know, any restriction on the First Amendment's free speech clause must be narrowly drawn to avoid limiting speech beyond what is necessary to achieve the intent of the restriction. Restrictions must also include "fair notice" (i.e. clear and precise terms defining the restricted speech) and provide adequate alternative forms of communication.

Given the unfortunate failure of City staff's proposed ALO draft to track the recommendations of the Working Group and consider First Amendment concerns, **TDS views the 10/11/17 ERC and ZWAC review and vote on recommendations to Council as a CRITICAL step** in ensuring that the ALO is finally reformed in a way that will not only allow TDS to resume responding to City solicitations but also establish a consistent, fair and transparent contracting process for all City vendors that can withstand possible legal challenges based on free speech restrictions.

Accordingly, we have attached and linked several important documents for your review, including [a legal analysis of City staff's proposed revised ALO vis-à-vis First Amendment issues](#); a [TDS redlined revision to staff's proposed revised ALO](#) reflecting both our First Amendment concerns and our policy recommendations, including comments (in blue) explaining each proposed ordinance change; a [bullet point synopsis of each proposed ordinance change](#); and a [notation of key differences between the Working Group recommendations and staff's resulting proposal](#).

Please note that TDS' primary position has been and remains that the unique conflict inherent in City staff's dual role as waste services industry regulator and industry competitor merits the full ongoing exemption of all waste services contracts from the requirements of the ALO ([Council voted on 4/6/17 to temporarily waive the ALO](#) for all waste solicitations, which remains in effect until further Council action). Note also that Council has previously voted to permanently exempt other groups of bidders from the ALO – exemptions staff proposes to maintain in the proposed revised ordinance. As an alternative to a full ongoing exemption, TDS will continue to advocate for changes as reflected in the attached documents, including proposed changes specific to solid waste, recycling and organics management.

Finally, while the attached documents reflect numerous areas of concern, there are at least three unresolved issues of particular importance:

- **Oversight** – Under both the current ALO and the revised proposed ALO, City staff would continue to serve as judge, jury, prosecutor and appeals court for each alleged violation. As per the recommendation of the Waste Management Policy Working Group, TDS urges ERC to recommend that all staff-determined ALO disqualifications be subject to an appeal process including a protest hearing before the Ethics Review Commission and a final appeal and hearing before the City Council. This is essential for ensuring due process.

- **Administrative Rules** – While the Waste Management Policy Working Group specifically recommended that all administrative rules associated with the ALO be approved by the City Council before taking effect, City staff’s proposed revised ALO instead assigned rule-making authority to staff rather than Council. TDS urges ERC to recommend honoring the Working Group recommendation and re-establishing that Council should approve the ALO’s administrative rules. TDS further urges the ERC to recommend that all proposed administrative rules for the ALO be considered by the ERC for a recommendation of approval, rejection or revision to the City Council. (If proposed ALO revisions are specific to solid waste, recycling and organics management solicitations, proposed administrative rules should also be considered by ZWAC for a recommendation to the City Council.)

- **Recusals** – City staff’s proposed revised ALO introduces compulsory recusals of City officials who receive “a representation” – a concept never discussed by the Waste Management Policy Working Group. This addition to the ALO not only establishes an overbroad restriction but is also in conflict with existing ethics rules charging City officials, rather than staff, with determining when recusal is required. TDS urges ERC to recommend elimination of this recusals provision.

Once again, TDS believes that the ERC and ZWAC recommendations are CRITICAL to strengthening and sustaining the ALO – i.e. leaving no room for subjectivity or abuse moving forward – and as such we urge you to please take the time necessary to fully and carefully review and deliberate City staff’s proposed ordinance rather than being rushed unnecessarily to develop final recommendations. **Importantly, this is the first proposed revision to the ALO since Judge Yeakel’s 2014 ruling that City staff’s interpretation of the ordinance was erroneous.** There is no rush to act, and, without revision, a violation of First Amendment challenge risk exists, considering a likely continuation of staff’s insistence on controlling the information made available to boards, commissions and the Council related to waste services solicitations over the past nine years.

Thank you once again for your service on the ERC, and please do not hesitate to contact me or Michael Whellan directly with questions or concerns.

Sincerely,
Bob Gregory
President & CEO
Texas Disposal Systems
512-619-9127

[REDACTED] ns

[REDACTED]





MEMORANDUM

FROM: Jim Hemphill

DATE: September 28, 2017

RE: First Amendment implications of the proposed revisions to Austin Anti-Lobbying Ordinance

This memo will outline some of the First Amendment concerns regarding Austin's Anti-Lobbying Ordinance ("ALO"), in the context of the proposed revision to the ALO. It is not intended to be a comprehensive analysis of all possible interpretations and applications of the ALO, but rather a high-level view of some of the more obvious issues. Therefore, there might be circumstances unaddressed in this memo in which interpretation or application of the ALO raises additional First Amendment problems.

First Amendment principles and doctrines.

The bedrock purpose of the First Amendment's free speech clause (as well as its analog in the Texas Constitution, Article I Section 8) is to prevent government restriction of speech. Because the ALO prohibits certain types of speech for those seeking City contracts, it implicates First Amendment considerations.

Like most constitutional guarantees, the First Amendment is not absolute. Some government restriction of speech is allowable under certain circumstances. Determining whether a government speech restriction is allowable under the First Amendment involves examination of, *inter alia*, the type of speech at issue and the scope of the restriction.

The most suspect government speech restrictions are those that infringe on **political speech** (including the right to petition the government) and those that are **content-based**. The right to petition the government is a fundamental constitutional right. *See, e.g., McDonald v. Smith*, 472 U.S. 479 (1985). Speech discussing government policy and decisions is the essence of protected political speech. *See, e.g., Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). Communication with executive officials regarding a particular project is core political speech entitled to the highest level of constitutional protection, and infringements upon that speech will be strictly

scrutinized. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988). Political speech is fully protected under the First Amendment, even if the speaker is an entity ultimately motivated by commercial gain, such as a corporation. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Content-based speech restrictions are those that prohibit speech based on the substance of the message being communicated. When a government restriction allows communication of some types of messages, but restricts others that are made to the same audience or through the same channel but differ only in their content, the restriction is content-based. *See, e.g., Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (ordinance that allowed some picket signs but not others, based on the message conveyed, was a content-based speech restriction). Content-based speech regulations are presumptively invalid. *See, e.g., Citizens United, supra; Davenport v. Washington Educ. Ass’n*, 127 S.Ct. 2371 (2007); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Such regulations are constitutional only if they pass the “strict scrutiny” test – the government must show the existence of a **compelling interest** and that the regulation is **narrowly tailored** to advance that interest. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).

Some government speech restrictions are **content neutral** and are subject to a less-strict test of constitutionality. Such restrictions do not depend upon the substance of the speech at issue. Content-neutral restrictions (sometimes referred to as “time, place and manner” restrictions) must be narrowly drawn to serve a significant governmental interest, and leave open alternative channels of communication. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

At the very least, the ALO is a content-neutral speech restriction. An argument may be made that the ALO is in fact a content-based restriction on political speech, and thus subject to “strict scrutiny” – which makes a speech restriction more likely to be found unconstitutional. In fact, content-based restrictions are “presumptively unconstitutional.” *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

Speech about a proposal for a municipal contract is not simply commercial speech motivated by a desire for financial gain. Such contracts almost always involve the expenditure of public funds or use of other public resources. The wisdom of entering into any particular municipal contract is inherently a political issue. And, as the *Citizens United* case confirmed, political speech is entitled to a high degree of constitutional protection, even if the speaker is ultimately motivated, in whole or in part, by potential financial gain.

Analysis of both content-based and content-neutral speech involve examination of the governmental interest that the restriction allegedly promotes, and whether the restriction “fits” that interest – that is, whether the restriction is tailored to promote that governmental interest and does not restrict speech more broadly than necessary to

promote that interest. Thus, a First Amendment analysis of the ALO must examine the governmental interest it furthers, and whether it is tailored to promote that interest without restricting more speech than necessary for such promotion. The ALO must also leave open sufficient alternative avenues of communicating the speech that it restricts.

A speech restriction must also be framed in clear and precise terms. “Regulation of speech must be through laws whose prohibitions are clear. ... [T]he statute must provide ‘fair notice’ so that its prohibitions may be avoided by those who wish to do so.” *Service Employees Int’l Union v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972)). See also *Webb v. Lake Mills Community School Dist.*, 344 F.Supp. 791 (D.C. Iowa 1972) (citing cases for the principle that “no person shall be punished for conduct unless such conduct has been proscribed in clear and precise terms. This is especially true when the conduct involves First Amendment rights” (citations omitted)).

Potential First Amendment issues with the ALO.

1. Scope of the speech restriction.

The proposed revised ALO restricts entities who have responded to a City request for proposal or invitation to bid from making “representations,” as defined in the ALO, under certain circumstances. The proposed definition of “representation,” found in Section 2-7-102(9), is:

REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:

- (a) related to a response;
- (b) made by a respondent or agent; and
- (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

This definition in turn incorporates other terms defined in the ALO, including “response,” “respondent,” and “agent.” While there are issues (both legally and policy-based) with other aspects of this definition, for present purposes this memo will address potential First Amendment concerns.

The ALO does not specify whether a representation is only “made *to*” a council member or City employee/representative/contractor if that representation is made **directly** to such a person (such as a face-to-face conversation or directed email communication), or if it encompasses a statement made to an identifiable group that **includes** such a person, or if it even more broadly includes a statement made to the general public (such as through the media, an advertisement, or a website) that may be **seen or heard** by such a person.

This ambiguity raises at least two fundamental First Amendment issues. First, this provision of the ALO does not provide the constitutionally required “fair notice” regarding what speech it purports to restrict. Interpretation of this provision as a ban only on direct statements to the class of persons defined in 2-7-102(9)(c) may substantially mitigate the vagueness concern, though allowing City personnel such latitude in interpretation may itself raise issues regarding the appropriate scope of discretion in determining whether a violation has occurred.

The second issue is one of both narrow tailoring and of providing adequate alternate forms of communication. It may be argued that a prohibition on direct statements to the defined class of persons serves the interests the ALO purports to further (providing a “fair, equitable, and competitive process” to choose vendors, and to further compliance with State procurement laws, ALO § 2-7-101(B)).¹ But restricting speech directed at groups that *might* include such persons, or worse yet restricting speech aimed at the general public, would sweep far more broadly than necessary to further the asserted governmental interests, and would shut down almost all channels of communicating the potential vendors’ messages (such as a statement that awarding the contract to a potential vendor would be in the public’s best interest).

The ALO would be less vulnerable to First Amendment challenge if Section 2-7-102(9) were revised per the following redline:

REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:

- (a) related to a response;
- (b) made by a respondent or agent; and
- (c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.
- (d) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.

These changes clarify that the prohibition is on direct communications only, and that the ALO does not purport to restrict speech directed at audiences other than the individuals defined in 2-7-102(9)(c).

2. Consistency of defined terms to avoid non-uniform interpretation and application.

¹ This memo assumes, without specifically addressing the issue, that the governmental interests that the ALO purports to further are at the least “significant” interests. It is conceivable that the ALO may be vulnerable to challenge on the ground that those interests are not sufficient to meet the applicable test for constitutionality.

Section 2-7-102 sets forth definitions of certain terms for purposes of the ALO. To avoid lack of clarity that may raise First Amendment and/or due process concerns, it should be made clear that the definitions apply to **every** use of the defined term in the ALO. In the past, there have been City employees who have applied the definition of a term when used in one context in the ALO, but when the same term is used in another context, have claimed that the term should be given its common meaning, instead of the defined meaning. It is therefore recommended that the introductory phrase of this section be edited as follows:

§ 2-7-102 – DEFINITIONS.

In this article, for all purposes whenever used:

3. Vagueness in definition of “agent.”

The defined term “agent” in 2-7-102(1) includes “a person acting at the request of respondent,” “a person acting with the knowledge and consent of a respondent,” and “a person acting with any arrangement, coordination, or direction between the person and the respondent.”

These provisions are vague – possibly unconstitutionally so, under both First Amendment and due process analyses – and are subject to interpretation in a manner that would be unconstitutionally overbroad.

For example, suppose a bidder speaks with a member of the public regarding the solicitation, informs that person of the perceived benefits of awarding the contract to the bidder, and tells the person that if they agree, they should let their council member know their opinion. If the member of the public subsequently expresses his or her opinion to a council member, is he or she “acting at the request of respondent” and thus the communication constitutes an ALO violation on the part of the bidder?

Or suppose that the bidder again informs the person of the perceived benefits of awarding the contract to the bidder, and the person replies, “I’m convinced, and I’m going to tell my council member how I feel if that’s OK with you.” Is the person “acting with the knowledge and consent of a respondent” if he or she follows through by telling the council member his or her opinion? Is the bidder required to say “no, it’s not OK if you express your opinion to your council member?”

As vague as “request” and “knowledge and consent” are, the provision regarding “a person acting with any arrangement, coordination, or direction between the person and the respondent” is even more vague and potentially overbroad. What is “coordination”? What is “**any** arrangement”? If meant to prohibit payment to a person to express an opinion, that may pass First Amendment muster; if it reaches the hypothetical situations

set forth above, the prohibitions would very likely be considered to be not narrowly tailored and to be unconstitutionally vague.

To address this lack of clarity and potential overbreadth, 2-7-102(1)(a) could be amended as follows:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:
 - (a) a person acting at the explicit request of respondent in exchange for any type of consideration;

This amendment of subsection (a) would encompass all situations that could rationally be reached by the proposed subsections (b) and (c), which thus should be deleted entirely.

4. Circular definition of “response.”

The proposed revised ALO’s definition of “response” in 2-7-102(7) uses the word “response” to define the word “response,” resulting in another lack of clarity. In the bidding situation, what does a “response to a solicitation” mean? If used in the common, undefined sense, a “response to a solicitation” can mean **any** statement or communication made that relates to a solicitation, even if that statement or communication is not a “response” in the sense the definition appears aimed at – a submission by a bidder in an attempt to secure the contract that is the subject of a solicitation. A broader interpretation would result in the ALO not being narrowly tailored to serve the purported governmental interest, and in being unconstitutionally vague. To this end, the definition should be clarified:

- (7) RESPONSE means ~~a response to a solicitation~~ only the contents of a sealed proposal submitted by a bidder replying to a solicitation.

5. Clarification of permitted statements regarding existing contracts.

The proposed amended ALO clarifies that statements regarding existing contracts are generally not prohibited “representations,” even if the existing contract covers the same general subject matter as the pending solicitation. This is a welcome clarification; application of the ALO to bar speech regarding an existing contract would have serious First Amendment overbreadth issues.

However, the proposed language of 2-7-104(2) regarding permitted communications is limited to statements about existing contracts between a “respondent” as defined in the ALO – a bidder – and the City. As written, it does not allow a “respondent” to make

statements about existing contracts between the City and *other* contractors having existing contracts. This is clearly a content-based speech restriction and thus is presumptively unconstitutional. A suggested revision:

(2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~ any person or entity and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

6. Possible conflict between prohibited and permitted “representations.”

Section 2-7-103 outlines “representations” (as defined in the ALO) that are prohibited, and Section 2-7-104 sets forth representations and other communications that are permitted. While 2-7-104 states that the listed representations and communications “are permitted under this article at any time,” there is possible tension between its list of permitted communications and the list of prohibited “representations” under 2-7-103.

Of particular concern are the provisions in 2-7-103 that purport to prohibit statements that “advance the interests of the respondent” or “discredit the response of any other respondent.” Based on past interpretations and applications, there is the possibility that a statement covered by 2-7-104(2) (discussed above, regarding statements related to existing contracts) could be interpreted as falling within 2-7-103’s prohibitions (despite the statement that communications falling under 2-7-104 are permissible “at any time.”

To remove potential conflict and to clarify that 2-7-104’s “safe harbor” trumps any contrary interpretation of 2-7-103, it is suggested that the following be added to 2-7-103 (or 2-7-104):

Permitted communications under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3).

7. Prohibiting speech based on the listener’s reaction rather than the speech itself.

As set forth above, a speech restriction must be sufficiently clear to give notice to the speaker as to whether the restriction applies to the speaker’s speech. However, certain provisions of the proposed revised ALO appear to ban speech based on the listener’s reaction to the speech, rather than the speech itself. Section 2-7-103(6) prohibits a “representation” if it:

directly or indirectly asks, **influences**, or **persuades** any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider

or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

[Emphases added.] While a speaker can control whether his or her speech “asks” for certain action, it is the *listener*, not the speaker, who determines whether the speech “influences” or “persuades” him or her to take (or not take) certain action. The words “influences or persuades” should be stricken from this provision.

Conclusion.

Any government restriction on speech should be closely scrutinized from both a legal and policy perspective, and (assuming the restriction passes constitutional muster) must be clearly written and applied narrowly and in accordance with its specific language. Unfortunately, there is a history of overly broad and erroneous interpretation and application of the City’s ALO (for one example, see *Texas Disposal Systems, Inc. v. City of Austin*, Cause No. A-11-CV-1070-LY, in which the U.S. District Court for the Western District of Texas reversed the City’s interpretation and application of the then-current ALO that resulted in a wrongful disqualification). While the need for *any* ALO remains questionable, particularly for certain types of proposed contracts, the City should endeavor to make the ALO (if one is to exist) narrow, predictable, and aimed squarely at furthering its actual purpose.

**TDS Recommended Revisions Redlined
and Comments in Blue**

RECOMMENDED REVISIONS, 9-28-2017

ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 – FINDINGS; PURPOSE; APPLICABILITY.

- (A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.
- (B) The council finds that it is in the City's interest:
 - (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The council intends that:
 - (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) This article applies to all solicitations except:
 - (1) City social service funding;
 - (2) City cultural arts funding;
 - (3) federal, state or City block grant funding;
 - (4) the sale or rental of real property;
 - (5) interlocal contracts or agreements; and
 - (6) solicitations specifically exempted from this article by council.
- (E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 2011111052.

§ 2-7-102 – DEFINITIONS.

In this article, for all purposes whenever used:

TDS Comment:

This revision makes it clear that defined terms will be used for interpretation of the Ordinance.

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:
 - (a) a person acting at the explicit request of respondent in exchange for any type of consideration;

~~(b) — a person acting with the knowledge and consent of a respondent;~~

~~(c) — a person acting with any arrangement, coordination, or direction between the person and the respondent;~~

~~(d)~~ (b) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;

~~(e)~~ (c) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and

~~(f)~~(d) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.

TDS Comment:

This revision narrows the overly broad definition of Agent, which would require staff to determine the nature of relationships and communication among entities without any objective means of doing so. Please see Jim Hemphill's 9/27/2017 Memo on constitutional requirements of speech restrictions as they pertain to staff's proposed ALO revisions (Hemphill Memo).

(2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.

(3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).

(4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).

(5) ~~NO-CONTACT RESTRICTED COMMUNICATION~~ PERIOD means the period of time beginning at the final effective date and time a Response to a solicitation is due, ~~as may be extended in the purchasing officer's discretion,~~ and continuing through the earliest of the following:

(a) the date of the initial execution of the ~~last~~ contract resulting from the solicitation is signed (if multiple contracts are executed pursuant to a solicitation, then the date of initial execution of the last contract to be signed);

(b) ~~630~~ days following council authorization of the last contract resulting from the solicitation; ~~or~~

(c) cancellation of the solicitation by the City;

(d) 14 days prior to the date a contract or RCA related to solid waste, recycling or organics is considered for action by the City Council, or

~~(e)~~(e) 14 days prior to the date a contract or RCA is considered for recommendation by the Zero Waste Advisory Commission.

TDS Comment:

As there is not an actual "No Contact Period" envisioned by the ordinance; for the sake of accuracy this term should be changed to "Restricted Contact Period", as there are a variety of communications that are both permitted and prohibited. Further edits are intended to 1) utilize language that is not subject to variable interpretations, for the sake of creating a clear expectation of the effect of the proposed limits on speech, which is required when limiting speech; 2) more reasonably limits the time respondents will be bound by the ALO in the event that staff choose not to take any action pursuant to a solicitation; and, 3) creates an earlier termination of the Restricted Contact Period specifically for solicitations for solid waste, recycling and organics management related services. This market segment specific provision is necessary due to the staff's unique dual role as both regulator of, and competitor within this market segment, staff's history of ambitious pursuit of greater control over and revenue

from this market segment, and staff's demonstrated propensity to embed significant policy implications concerning this market segment within the solicitation process. The ability of respondents to speak freely with policy makers prior to finalization of contracts will serve more as deterrent to staff's problematic attempts to create "policy by RFP", rather than an opportunity for respondents to advocate for their solicitation specific interests.

- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.
- (7) RESPONSE means ~~a response to a solicitation; only the contents of the a sealed proposal submitted by an offeror a bidder replying to a solicitation to provide the goods or services solicited by the City.~~

TDS Comment:

This revision simply defines "Response" in the manner that staff's "Comparison Matrix" states that it will be interpreted. However, staff has maintained a problematic circular definition of Response that can be subject to wildly variable interpretations.

- (8) RESPONDENT means a person who ~~makes~~ submits a ~~R~~Response to a City solicitation, even if that person subsequently withdraws its ~~R~~Response ~~or has been disqualified by the City~~, and includes:
- ~~(a) — a contractor for a respondent;~~
 - ~~(b)~~ (a) a subsidiary or parent of a respondent; and
 - ~~(c) — a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and~~
 - ~~(d)~~ (b) a subcontractor to a respondent in connection with that respondent's response.

TDS Comment:

These revisions remove unnecessary portions and limit the requirements to things that can be objectively determined by staff. Revisions also eliminate the potential for broad interpretations that would allow the staff to enforce against speech that is not constitutionally eligible for government restriction.

- (9) REPRESENTATION means a communication, ~~whether or not initiated by a respondent or agent~~, that is:
- (a) related to a response;
 - (b) made by a respondent or agent; and
 - (c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.
 - ~~(d)~~ (b) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.

TDS Comment:

This revision clarifies the limit of speech that is constitutionally allowed to be restricted. Please see the Hemphill Memo for the detailed basis for this revision.

(10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;
- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 – PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that ~~is intended to or reasonably likely to:~~

- (1) provides substantive information about the response to which it relates;
- ~~(2) advance the interests of the respondent with respect to the solicitation to which it relates;~~
- ~~(3)(2) discredit the response of any other respondent to the solicitation to which it relates;~~
- ~~(4) — [NOTE – an alternative to strikeout may be something like “Permitted representations under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3).” This resolves any potential interpretive conflict between those provisions.]~~
- ~~(5)(3) encourages~~ the City to reject all of the responses to the solicitation to which it relates;
- ~~(6)(4) convey~~ a complaint about the solicitation to which it relates; or
- ~~(7)(5) directly or indirectly asks, influences, or persuades~~ any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

This revision removes criteria that cannot be objectively determined by the staff, and appropriately tailors the ordinance to the constitutional limits on restriction of speech. Please see the Hemphill Memo for the detailed basis for this revision.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~ any person or entity

and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

TDS Comment:

This revision removes a content based restriction on speech that is presumptively unconstitutional. Please see the Hemphill Memo for further detail.

- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) ~~any communication occurring when~~ making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

TDS Comment:

Contrary to statement of staff, this is not simply a concept carried forward from the previous version of the ordinance, staff's language would actually lift all ALO restrictions, under the condition that otherwise prohibited statements would be accompanied by a monetary donation to a campaign, while existing (and TDS proposed) language simply make clear that a campaign donation is not a restricted communication. Staff's language could not be more counter to the stated intent of the ordinance.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 – MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer must promptly transmit any such written waiver, modification, or reduction to all respondents.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 – ENFORCEMENT.

- ~~(A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.~~
- ~~(B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.~~
- ~~(C)~~(A) The purchasing officer has the authority to enforce this article through Council approved rules ~~promulgated in accordance with Section 1-2-1~~, which at a minimum shall include a notice, ~~and protest hearing and appeal~~ process for respondents disqualified pursuant to Section 2-7-107, including:
- (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to ~~protest the penalty imposed~~ a hearing before, and determination by, the Ethics Review Commission; and
 - (3) written notice of the right to ~~request a an impartial hearing process~~ a final appeal before the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

The TDS proposed revisions to the Enforcement section are intended to accomplish 1) Removal of the arbitrary exclusion of the Ethics Review Commission from any oversight role in the Ordinance; 2) Removal of the problematic language providing the purchasing officer the authority to determine when/if violations should be ignored for whatever reason staff sees fit; 3) Establish that administrative rules must be approved by Council as recommended by the Council Waste Management Policy Working Group; 4) allow for a protest hearing before, and decision by the Ethics Review Commission as recommended by the Council Waste Management Policy Working Group; and, 5) allow for a final appeal before City Council. Without these changes to the enforcement section of the ALO, the staff would have absolute authority to establish rules, interpret and enforce the ordinance without any oversight of any kind from elected officials or their appointees. Given staff's dismal record of fairly interpreting and enforcing the ALO, these changes are imperative.

§ 2-7-107 – PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same ~~or similar~~ project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same ~~or similar~~ project".
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

TDS proposed revisions to the “Penalty” section are necessary eliminate opportunities for interpretations that go beyond the intent of the ALO, and to create a clear expectation of the results of a violation. Without the revisions to the “same or similar project” language, the staff effectively maintains the ability to permanently debar a vendor, as they would have the ability to determine that any solicitation within a particular market segment is a “similar project” to a solicitation that was the subject of a disqualification. Also, without the inclusion of the term “Council” at the end of 2-7-107(D), the staff would have the authority to unilaterally subvert the will of the Council, based simply on a retroactive allegation of prohibited communication, without substantiation. If there is a need to void a contract due to violations of the ALO, then the Council should make that decision.

~~§ 2-7-108 — RECUSAL~~

- ~~(A) — During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~
- ~~(B) — A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~
- ~~(C) — If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

TDS Comment:

Staff’s newly proposed “Recusal” section amounts to an unprecedented transfer of authority from the Council to staff and should be rejected outright. Under this provision, along with others proposed by staff, staff would be empowered to impose compulsory recusal on any Council Member or B&C Member by simply claiming they spoke to a respondent, or failed to report contact between a respondent and any other City employee or official, whether or not the subject of that communication was prohibited, and regardless of whether or not staff determines that a violation of the ALO has taken place. This would give the staff the ability to remove individual votes they may deem unfriendly to their stated or unstated agendas, without any requirement to carry out the remaining supposed requirements of the ordinance. Council Members and their appointees on B&C’s should have the sole authority to determine whether they ought to be recused from taking action based on existing code of ethics requirements, and not be subject to the staff unilateral declaration of recusal, without any requirement to substantiate their basis for doing so.

TEXAS DISPOSAL SYSTEMS PROPOSED CHANGES TO CITY STAFF'S REVISED
ANTI-LOBBYING ORDINANCE

October 6, 2017

*To avoid infringing on **First Amendment free speech rights**, ensure administrative objectivity, avoid confusion, and deliver consistency and transparency, TDS proposes the following:*

NO CONTACT PERIOD

- To acknowledge that specific communications are permitted, change the name “NO CONTACT PERIOD” to “RESTRICTED CONTACT PERIOD”.
- In recognition of City staff’s dual role as waste industry competitor *and* regulator, for all solid waste, recycling and organics management solicitations, lift the “RESTRICTED CONTACT PERIOD” a minimum of 14 days prior to the date a contract or RCA is considered by the City Council and/or Zero Waste Advisory Commission.
- For solicitations unrelated to solid waste, recycling and organics management, clarify that the “RESTRICTED CONTACT PERIOD” begins at the final effective date and time solicitations are due, and ends at either initial execution of the resulting contracts or 30 days after Council authorization, whichever is earliest.

PERMITTED REPRESENTATIONS

- Ensure that the definitions of “PERMITTED REPRESENTATION” and “PROHIBITED REPRESENTATION” are mutually exclusive.
- Ensure that the definition of “REPRESENTATION” excludes communications to the media and community groups.
- Ensure that the definition of “REPRESENTATION” is specific to *direct* communications with identified parties, rather than encompassing all communications to all parties.
- Ensure that the definition of “PROHIBITED REPRESENTATION” is based on the content of the communication itself rather than on the listener’s reaction by removing words like “influences” or “persuades.”
- Eliminate all definitions of “PROHIBITED REPRESENTATION” that require subjective analysis, including “advances the interest of the respondent” and “discredits the response of any other respondent.”
- Ensure that the definition of “PERMITTED REPRESENTATION” includes communication related to any *existing* contract *not only* between the respondent and the City but also between *any* person or entity and the City.

- Clarify that while making a campaign contribution to a City Council member does *not* constitute a “PROHIBITED REPRESENTATION” in and of itself, any communication associated with making the campaign contribution continues to be subject to ALO restrictions.

DEFINITIONS

- Clarify that all definitions apply consistently across the ordinance.
- Narrow the definition of “AGENT” to mean *only* a person acting at the explicit request of a solicitation respondent in exchange for consideration.
- Narrow the definition of “RESPONSE” to mean *only* the contents of a sealed proposal submitted by a bidder in response to a solicitation.
- Narrow the definition of “RESPONDENT” to a person or entity who submits a “RESPONSE” *excluding* persons or entities who have withdrawn a “RESPONSE” or been disqualified by the City.

ENFORCEMENT / “MITIGATING FACTORS”

- Establish that the ALO is subject to enforcement by the Ethics Review Commission.
- Eliminate the proposed authority of the purchasing officer to “consider mitigating factors” in determining violations.
- As per the original recommendation of the Waste Management Policy Working Group, establish that all administrative rules associated with the ALO must be approved by the City Council before taking effect.
- As per the original recommendation of the Waste Management Policy Working Group, establish that all staff-determined ALO disqualifications are subject to an appeal process including a protest hearing before the Ethics Review Commission.
- Establish that all staff-determined ALO disqualifications are subject to a final appeals process including a protest hearing before the City Council.

PENALTY

- Clarify that a respondent who is disqualified under the ALO may not respond to a subsequent solicitation for the same – rather than a “similar” – project.
- Clarify that any contract awarded to a respondent later determined to have violated the ALO with respect to the original solicitation can be voided by the *City Council*, rather than by City staff.

RECUSALS

- Eliminate compulsory recusals of City officials who receive “a representation.” This staff-proposed *addition* to the ALO not only establishes an overbroad restriction but is also in conflict with existing ethics rules charging City officials, rather than staff, with determining when recusal is required.


ADMINISTRATION

- Clarify that if the purchasing officer makes any modifications to prohibitions for any solicitation, each solicitation respondent must be promptly notified.

**Texas Disposal Systems Comparison of Staff Proposed ALO Revisions vs.
Council Working Group Recommendations**

October 6, 2017

<u>Working Group Recommendation</u>	<u>Staff Proposal</u>
<ul style="list-style-type: none"> Apply the ALO ordinance only to the solicitation. Vendors may communicate on all other matters without violating the ALO. 	<ul style="list-style-type: none"> Staff proposed language can be interpreted to include the restriction applying to communication far beyond the specific solicitation.
<ul style="list-style-type: none"> Apply the ALO from the time a RFP is released through Council's vote on executing the contract. Should an RFP be pulled down, the ordinance does not apply during the timeframe the RFP is pulled down. 	<ul style="list-style-type: none"> ALO applies from the time any undefined response to a solicitation is due, until various points after the Council votes to approve a contract.
<ul style="list-style-type: none"> Narrow the definition of representations to target lobbying. For instance, if staff tells a vendor that the ALO does not apply and a communication is allowable – then the vendor cannot be later be disqualified as violating the ordinance by the communication. 	<ul style="list-style-type: none"> Purchasing officer is given broad authority to determine whether or not a violation should be assessed. Staff also has given themselves the authority to unilaterally impose recusal on any City employee, CM, or B&C member.
<ul style="list-style-type: none"> Add communications regarding existing contracts to "Permitted Communications". 	<ul style="list-style-type: none"> Only existing contracts between a communicating respondent and the City are exempt.
<ul style="list-style-type: none"> Develop a body of Rules in a companion document to the ALO that defines enforcement, appeal, complaint, and debarment procedures. Rules should: <ol style="list-style-type: none"> Clarify current definition of "Representation" and what triggers debarment. Clarify procedures for determining violations, judgement, and penalty enforcement, and incorporate a third party reviewer such as the Ethics Review Commission to determine violations, judgement, and penalty enforcement. Clarify process for submitting and facilitating complaints. City purchasing and legal should develop this companion document for approval by Council and prepare any language updates to the ALO that might be required to allow for adopted rules in the companion document. 	<ul style="list-style-type: none"> Staff has not proposed rules for the ALO <ol style="list-style-type: none"> Not addressed by staff. Staff explicitly states that there will be no third party review, oversight or appeal of any kind. Staff has completely removed the process for receiving and communicating complaints re: the solicitation to Council. Staff explicitly states that Rules will not be presented to or approved by Council.
<ul style="list-style-type: none"> Existing ALO should remain suspended until Council approves proposed revisions. 	<ul style="list-style-type: none"> Not addressed by staff.
<ul style="list-style-type: none"> Purchasing Office should receive and compile further stakeholder input for Council and will work with adopted input as determined by Council. 	<ul style="list-style-type: none"> Purchasing office solicited no such additional stakeholder input prior to taking the ALO revisions to Council seeking approval on 9/28/17.



From: Whellan, Michael [REDACTED]
Sent: Tuesday, October 10, 2017 2:26 PM
To: Thompson, Brian - BC
Cc: Whellan, Michael; Einhorn, Peter - BC
Subject: Additional information - Guidelines for Respondent Conduct

Follow-up items (copying Peter Einhorn since he and I discussed some of these items also) -

Article 6 is only about the solicitation process and Guidelines for Respondent conduct (as we discussed, I think "Anti-Lobbying Ordinance" is a misnomer).

Attached are the following:

1. The 4-page chart showing 56 days when we would have been in a safe harbor to talk with Council Members or Commissioners over the past 7.5 years!
2. 2-page summary of the ALO changes that TDS is seeking.
3. 1-pager that shows the discrepancies between what the City Council Working Group requested and what staff – without stakeholder feedback – decided to place on the Council Agenda (which then caused this diversion),
4. The 7-21-2017 5-page City Council working group recommendations (**only #8 on page 4-5 applies to ALO**).
5. Staff's 5-10-2017 powerpoint concerning the ALO from the Working Group meeting is attached (**only pages 3-9 of the attached apply to ALO**) and, if you want to take a deep dive into waste – all City Council working group docs can be found at <http://www.texasdisposal.com/WastePolicy/>

City of Austin Council Waste Management Policy Working ...

www.texasdisposal.com

Given the need for clear policy directives concerning the City's pursuit of Zero Waste, on March 23, 2017 the Austin City Council voted unanimously to establish the ...

All good.

MJW.

Michael J. Whellan
Direct: 512.480.5734
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[REDACTED]

[REDACTED]

[illegible]

Illustration of Anti-Lobbying Ordinance (ALO) No-Contact Period on Austin Solicitations Involving Solid Waste, Recycling and Organics Services, November 16, 2009 to Present	
Solicitation Info	<div> <div>2017</div> <div>2016</div> <div>2015</div> <div>2014</div> <div>2013</div> <div>2012</div> <div>2011</div> <div>2010</div> <div>2009</div> </div>
4/15/13 "Landscape-Grade Special Topsoil" IFB SDC0257 Expired, Cancelled, Withdrawn 5/7/13	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
1/7/13 "Mattress Collection and Recycling Processing Svcs" IFBBV SDC0182 Executed 4/30/13	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
11/28/12 "Management and Disposal of Class 2 Industrial Non-Hazardous & Special Waste" IFB DKC0093 Executed 5/3/13	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
7/23/12 "Annual Contract for Sandy Loam and Topsoil" IFB STA0272 REBID Executed 11/8/12	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
6/18/12 "Organics Processing Svcs Pilot Program" (Includes Phase 1) IFBBV SDC0178 Executed 9/20/12	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
5/21/12 "Annual Contract for Sandy Loam and Topsoil" IFB STA0272 Expired 6/12/12	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
3/19/12 "Residential Refuse Dumpster Collection Svcs" IFBBV SDC0174 Executed 7/6/12	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
3/14/11 "Topsoil and Sandy Loam" IFB GAL0016 Executed 6/9/11	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
1/17/11 "Refuse Collection and Hauling Services for the Downtown Service District" IFBBV SDC0162 Executed 4/19/11	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
12/6/10 "Roll-off Container & Disposal Services for Grit, Screenings" IFB SSC0130 Executed 5/5/11	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
8/16/10 "Transportation of Single-Stream Recycling Material" IFB SDC0186 Cancelled, Expired, Withdrawn 12/17/12	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
8/2/10 "Refuse and Recycling Collection Svcs for City Departments" IFBBV SDC0158 Executed 12/1/10	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
2/8/10 "Topsoil and Sandy Loam" IFB SDC0182 Executed 6/28/10	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>
11/16/09 "Recycling Services" RFP RDR0005 Cancelled 6/10/10	<div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div><div>Oct</div><div>Sep</div><div>Aug</div><div>Jul</div><div>Jun</div><div>May</div><div>Apr</div><div>Mar</div><div>Feb</div><div>Jan</div> <div>Dec</div><div>Nov</div> </div>

NOTE: TDS will continue refining this document to reflect a complete multi-year illustration of the ALO No-Contact Period on Austin Solicitations Involving Solid Waste, Recycling, Organics and Portable Restroom Services covering the period January 1, 2008 to present

Illustration of Anti-Lobbying Ordinance (ALO) No-Contact Period on Austin Solicitations Involving Solid Waste, Recycling and Organics Services, November 16, 2009 to Present

[illegible]

[illegible]

Page 4 of 4

DRAFT 4-23-17

City Council Waste Management Policy Working Group

May 10, 2017



Waste Management Policy Questions

Solicitation Process:

- Should the City competitively solicit waste management contracts?
- For City waste management contracts, should Council waive the Anti-Lobbying Ordinance for future solicitations?

Solicitation Details:

- Should materials be directed to, or away from, certain landfills in future solicitations?
- Should some contract and services be consolidated?
- Should the City set diversion requirements for City waste management contractors?
- Is there a preferred way to manage used utility poles?
- Is there a preferred policy for biosolids management?

Service Questions:

- Should Austin Resource Recovery provide special event services?



More Questions Concerning Anti-Lobbying

Q: Provide more details on the policies and practices of other governments regarding Anti-Lobbying

Elements of Anti-Lobbying Prohibitions	Austin	Dallas	El Paso	Fort Worth	Houston	San Antonio	Travis County	State
Lobbying addressed in Ordinance/Code	YES	YES	YES	NO	NO (4)	YES	YES	YES (7)
Beginning of Anti-Lobbying Period	Solicitation Published	Solicitation Published	Multiple (3)	Solicitation Published	Proposal Due	Solicitation Published	"Procurement Process"	
End of Anti-Lobbying Period	Contract Signing	Council Authorization	Final Agenda		Final Agenda	Multiple (6)	"Procurement Process"	
All communications must be with designated contact person	YES			YES	YES	YES		
Prohibition also applies to Representatives	YES	YES		YES	YES	YES		
Excludes communications to a list of City staff and officials, in addition to Council	YES		Yes	YES	YES	YES		
Allows any communications made at posted public meeting.	YES	YES (2)			YES (5)			
Allow additional Communications if described in the solicitation	YES		YES	YES	YES			
Certain categories of solicitations are excluded, e.g., Human Services, Cultural Arts, CDBG, sale or rental of real property.	YES							
Includes a list/examples of excluded communications	YES					YES		
Anti-Lobbying Period can be extended due to re-solicit	YES							
Violation may result in: Disqualification from the Solicitation (DQ) or Debarment (DB)	DQ (1)		DB	DQ	DQ	DQ	DQ	
Is the contract voided if later it was found that a violation occurred?	YES							

Notes: (1) Debarment occurs after 3rd violation within 5 years. (2) Only stipulates the Council Meeting where the Award will be considered. (3) Period Begins at Multiple times: Regularly (Solicitation Published), for Unsolicited proposals and Public-Private Partnerships (Date they are submitted to staff). (4) Policy established in their Policy Manual, which is more prescriptive as their Chief Procurement Officer is appointed by the Mayor. (5) Only stipulates the Pre-Offer Conference and the Council Meeting after the Quiet period has ended. (6) Period Ends at Multiple times: for SBEDA (Proposal Due), Council (Agenda Posted) and City Employees (Contract Award). (7) Limited to solicitations involving Federal funds.

Q: Can contractors communicate regarding their existing contracts without violating Anti-Lobbying Ordinance?

- **Yes** – Contractors can and should communicate with staff regarding existing contracts
- 10. EXISTING CONTRACTS
It is not a violation of Article 6 of Chapter 2-7 of the City Code for a person with an existing contract or business relationship with the city to discuss issues related to that contract or relationship with a city employee or official... (R2011-COA-1)

Q: Does handing out a business card violate the ALO?

- **No** – Handing out a business card does not violate the ALO
- Respondents violate the ALO when they make a “Representation”
- A Representation is a communication to City staff or official that is related to a solicitation response (several examples provided in the ALO)
- A business card does not constitute a Representation

Q: Can the Anti-Lobbying Ordinance be revised to apply to the communications of non-respondents?

- **No** – Staff does not intend to limit this communication
- The City should only seek to maintain a level playing field for the respondents to the solicitation
- Non-respondents are not under the regulatory control of the City and the City has no authority to limit speech

Q: If a Vendor is debarred, is there an impact on existing contracts between the City and the Vendor?

- **No** – Existing contracts, that are not associated with the violation, are not impacted
- Debarment is the process of excluding a Vendor from consideration for **future awards** for up to three years (R2010-PO-1)
- If a violation of the ALO is determined after a contract is awarded, that contract may be voided (R2011-COA-1)
- Does not apply to contracts previously awarded that were unrelated to the violation (R2011-COA-1)

Staff: Recommendations regarding the Anti-Lobbying Ordinance



- **Revise the Anti-Lobbying Ordinance**
 - *Narrow the definition of “Representations” to target lobbying*
 - *Add communications regarding existing contracts to “Permitted Communications”*
 - *Shorten the No-Contact period*
 - *Revise the “Enforcement” section concerning debarments*
- **Revise Anti-Lobbying rules**
 - *Clarify process for determining violations*
 - *Clarify process for submitting and facilitating complaints*
- **Revise solicitation instructions regarding communications**



More Questions Concerning Confidentiality

Q: Provide more details on the policies and practices of other governments regarding Confidential Information

- Overview of solicitation instructions from larger municipalities in Texas (see Handout)
- Each were substantially similar regarding
 - *Compliance with the Texas Public Information Act*
 - *Proposal contents confidential through the evaluation process*
 - *Require offerors to mark all content they request be kept confidential*
 - *Make reasonable efforts to protect confidentiality but cannot guarantee*
 - *Information not marked as confidential would be made available, more commonly after contract award*


Q: Can board and commission members view confidential proposal contents.

- Council has not granted this level of authority to any Board or Commission previously – Not recommended by staff
 - *Board and Commission (Members) would need to sign confidentiality agreements that will remain in effect for years – even past their tenures*
 - *Members may unintentionally become involved in evaluations or negotiation exchanges, or any protests that may result*
 - *Members will not be able to discuss their observations or explain their recommendation for or against an item*
 - *Long processing times for Council items may increase further*
- Based on Work Group discussions contract contents, and not proposal contents, appear to be more meaningful to Members

Q: Clarify previous instance when TDS's contract was disclosed prior to Council action.

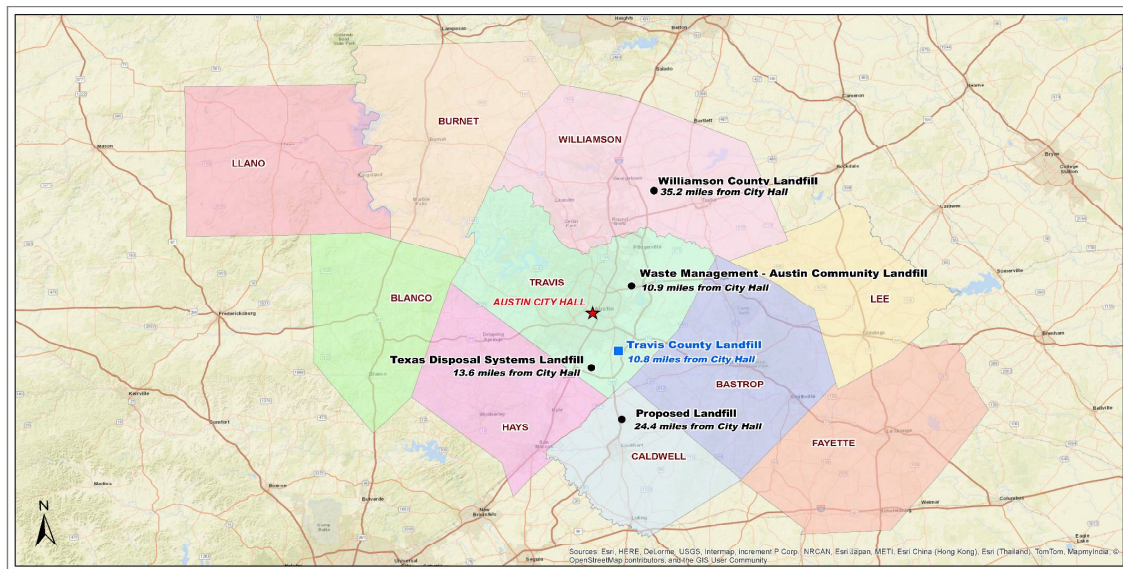
- Only one known instance – Recycling Services (non-competitive)
 - *Staff brought an item to Council recommending contract award for Recycling Services* (June 2010)
 - *Council rejected staff's recommendation and directed the Manager to negotiate contracts with TDS and another contractor* (August 2010)
 - *Staff brought two items back to Council to authorize contracts for Recycling Services* (April 2011)
 - *The entire contents of both contracts were included as backup*

Staff: Recommendations regarding the management of Confidential Information for certain procurements



- Increase the use of IFBs when appropriate
- Consider the use of alternative IFBs
 - *IFB – Best Value* (Criteria-based IFB)
 - *Low Price Technically Acceptable* (Federal process, not currently used)
- Consider increasing the use of Competitive Negotiations
- Explore approaches to maintain the confidentiality of proposal contents while making contract contents available for review prior to authorization

Should materials be directed to or away from certain landfills in future solicitations?



Municipal Landfills in 10 County CAPCOG Region

★ City Hall	■ BASTROP	■ HAYS
■ Type IV Landfill	■ BLANCO	■ LEE
● Type I Landfill	■ BURNET	■ LLANO
	■ CALDWELL	■ TRAVIS
	■ FAYETTE	■ WILLIAMSON

Should materials be directed to or away from certain landfills in future solicitations?

Currently:

- There is no policy direction from City Council that directs materials to or away from any specific landfill.
- For curbside service, City collection trucks haul the material to the Texas Disposal Systems landfill per the current landfill contract.
- For other City contracts, the City solicits bids and the respondents are only limited to landfills with valid operating permits.
- Using our contracts, the City can control the flow of material it generates or is responsible for managing. The City cannot regulate where private haulers take material managed under a private contract.
- As generators of the waste, the City may choose where its materials are managed/processed.

Should materials be directed to, or away from, certain landfills in future solicitations?

Policy Considerations:

- Should material be directed to, or away from, certain landfills?
- Pros to direct materials to, or away from, certain landfills:
 - Could clarify Council environmental goals
- Cons:
 - Would benefit some vendors and thus affect “competition” regarding collection/disposal service bids



WASTE CONNECTIONS, INC.
Connect with the Future

October 3, 2017

Austin City Hall
P.O. Box 1088
Austin, Texas 78767

Honorable Mayor Steve Adler:

Progressive Waste Solutions of TX, Inc. d/b/a WC of Texas respectfully conveys this letter for your consideration.

WC of Texas has had a productive presence in Austin for more than two decades, employing hundreds of local citizens and serving thousands of local customers. We have also been an active participant and observer of the Solid Waste Policy Focus Group; recently convened to address issues pertaining to the solicitation of solid waste and recycling Bids and Requests for Proposals.

Those issues include concern that many solicitations of solid waste services have been interrupted during the solicitation process, causing the contract awards to be withdrawn or delayed, much to the detriment of the City and the vendors that have submitted bids or proposals in good faith.

As we have testified to City Council, due to this interference, we have chosen not to submit responses to recent bids or RFPs and, until we can be assured of a fair opportunity to serve the City and its constituents.

To address this issue, The City convened the Solid Waste Policy Focus Group, seating four City Council Members and numerous industry representatives and other stakeholders. While several issues were clarified, it is most noteworthy that the conclusions of the SWPFG did not identify any mishandling, or the attempted creation of City Policy, by City Staff through the Bid/RFP process; effectively refuting allegations to the contrary.

The recommendations of the SWPFG include the following pertinent conclusions:

- The Anti-Lobbying Ordinance should be in effect from the time a Bid or RFP is issued through the time that City Council votes to execute the contract.
- Clarify what constitutes disbarment and penalties for violating the ALO.
- That the Ethics Review Commission potentially serve as a third-party reviewer to determine violations, judgment and penalty enforcement.
- That except in the case of an emergency, the City should continue to competitively solicit waste management contracts.

The crux of the matter is the application of the ALO as a clear and enforceable mechanism to prevent subversion of good faith responses to Bids/RFPs. This issue was not fully vetted by the SWPFG and is under further review. The City Purchasing Department has submitted draft revisions to the ALO to City Council and for public review.



WASTE CONNECTIONS, INC.
Connect with the Future

The draft finds [Article 6. 2-7-101 (B)] that: "The Council finds that it is in the City's interest to provide the most fair, equitable and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services". We support this approach.

We suggest that if the City desires to negotiate with a chosen vendor, or under the auspices of an existing agreement that provides such negotiations, then feel free to do so. However, if the City decides to issue a Bid or RFP then such side-bar negotiations should end or be suspended and not considered until such time as the City Council has voted to execute, or not execute, a contract obtained through the Bid/RFP solicitation.

The draft revisions to the ALO by the Purchasing Department include several streamlined processes but we are very concerned and object to the following potential changes:

- The No Contact Period is to begin at the point in time when Bids/Proposals are due to be submitted. This is directly contrary to the recommendation of the SWPFG that the No Contact Period begin when the solicitation is issued. It is also contrary to the existing ALO. The Purchasing Department asserts that if the No Contact Period is concurrent with the issuance of the solicitation it is difficult for them to track if an agent of a potential bidder/responder is in violation of the No Contact clause. We suggest that the Purchasing Department publish a list of all active solicitations so that City Officials and Staff can be aware of potential conflicts and record the contact in a City database.
- The draft eliminates the current penalty for repeat violations of the ALO; which specifies that a respondent that has violated the ALO more than two times in a five year period be barred from bidding for three years. Without this penalty, and the enforcement thereof, there is nothing to stop continued interference and disruption of the Bid/RFP process. The draft asserts that, since there is no record of disbarment, the penalty serves as deterrent only. A deterrent is certainly better than an open invitation to subvert the solicitation process and merely because disbarment has not occurred in the past doesn't mean it might not in the future.

We are very interested in continuing to work with the City and, under fair and good faith circumstances, are eager to respond to Bids and RFPs.

I have attached the pertinent documents for your reference; upon some of which I have made notations.

If anyone has any questions or comments regarding this letter please contact me on my email at [REDACTED] or my cell phone at 830-225-0735.

Respectfully,

Steven R. Shannon
WC of Texas
Austin, Texas

Copy to:



WASTE CONNECTIONS, INC.
Connect with the Future

Council Member Ora Houston
Council Member Delia Garza
Council Member Sabino Renteria
Council Member Gregorio Casar
Council Member Ann Kitchen
Council Member Jimmy Flannigan
Council Member Leslie Pool
Council Member Ellen Troxclair
Interim City Manager Elaine Hart
Assistant City Manager Robert Goode
City Attorney Ann Morgan
Interim Capital Contracting Officer Rolando Fernandez
Interim Chief Financial Officer Greg Canally
Interim Resource Recovery Department Director Sam Angoori
Purchasing Department Director James Scarboro
Zero Waste Advisory Commission Chair Gerard Acuna
Zero Waste Advisory Commission Staff Michael Sullivan
Ethics Review Commission Chair Peter Einhorn
Ethics Review Commission Secretary Robert Stratmann
Ethics Review Commission Staff Sue Palmer



WASTE CONNECTIONS, INC.
Connect with the Future

October 3, 2017

Austin City Hall
P.O. Box 1088
Austin, Texas 78767

Honorable Mayor Steve Adler:

Progressive Waste Solutions of TX, Inc. d/b/a WC of Texas respectfully conveys this letter for your consideration.

WC of Texas has had a productive presence in Austin for more than two decades, employing hundreds of local citizens and serving thousands of local customers. We have also been an active participant and observer of the Solid Waste Policy Focus Group; recently convened to address issues pertaining to the solicitation of solid waste and recycling Bids and Requests for Proposals.

Those issues include concern that many solicitations of solid waste services have been interrupted during the solicitation process, causing the contract awards to be withdrawn or delayed, much to the detriment of the City and the vendors that have submitted bids or proposals in good faith.

As we have testified to City Council, due to this interference, we have chosen not to submit responses to recent bids or RFPs and, until we can be assured of a fair opportunity to serve the City and its constituents.

To address this issue, The City convened the Solid Waste Policy Focus Group, seating four City Council Members and numerous industry representatives and other stakeholders. While several issues were clarified, it is most noteworthy that the conclusions of the SWPFG did not identify any mishandling, or the attempted creation of City Policy, by City Staff through the Bid/RFP process; effectively refuting allegations to the contrary.

The recommendations of the SWPFG include the following pertinent conclusions:

- The Anti-Lobbying Ordinance should be in effect from the time a Bid or RFP is issued through the time that City Council votes to execute the contract.
- Clarify what constitutes disbarment and penalties for violating the ALO.
- That the Ethics Review Commission potentially serve as a third-party reviewer to determine violations, judgment and penalty enforcement.
- That except in the case of an emergency, the City should continue to competitively solicit waste management contracts.

The crux of the matter is the application of the ALO as a clear and enforceable mechanism to prevent subversion of good faith responses to Bids/RFPs. This issue was not fully vetted by the SWPFG and is under further review. The City Purchasing Department has submitted draft revisions to the ALO to City Council and for public review.



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The draft finds [Article 6. 2-7-101 (B)] that: "The Council finds that it is in the City's interest to provide the most fair, equitable and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services". We support this approach.

We suggest that if the City desires to negotiate with a chosen vendor, or under the auspices of an existing agreement that provides such negotiations, then feel free to do so. However, if the City decides to issue a Bid or RFP then such side-bar negotiations should end or be suspended and not considered until such time as the City Council has voted to execute, or not execute, a contract obtained through the Bid/RFP solicitation.

The draft revisions to the ALO by the Purchasing Department include several streamlined processes but we are very concerned and object to the following potential changes:

- The No Contact Period is to begin at the point in time when Bids/Proposals are due to be submitted. This is directly contrary to the recommendation of the SWPFG that the No Contact Period begin when the solicitation is issued. It is also contrary to the existing ALO. The Purchasing Department asserts that if the No Contact Period is concurrent with the issuance of the solicitation it is difficult for them to track if an agent of a potential bidder/responder is in violation of the No Contact clause. We suggest that the Purchasing Department publish a list of all active solicitations so that City Officials and Staff can be aware of potential conflicts and record the contact in a City database.
- The draft eliminates the current penalty for repeat violations of the ALO; which specifies that a respondent that has violated the ALO more than two times in a five year period be disbarred from bidding for three years. Without this penalty, and the enforcement thereof, there is nothing to stop continued interference and disruption of the Bid/RFP process. The draft asserts that, since there is no record of disbarment, the penalty serves as deterrent only. A deterrent is certainly better than an open invitation to subvert the solicitation process and merely because disbarment has not occurred in the past doesn't mean it might not in the future.

We are very interested in continuing to work with the City and, under fair and good faith circumstances, are eager to respond to Bids and RFPs.

I have attached the pertinent documents for your reference; upon some of which I have made notations.

If anyone has any questions or comments regarding this letter please contact me on my email at steve.shannon@progressivewaste.com or my cell phone at 830-225-0735.

Respectfully,

Steven R. Shannon
WC of Texas
Austin, Texas

Copy to:



WASTE CONNECTIONS, INC.
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Council Member Ora Houston
Council Member Delia Garza
Council Member Sabino Renteria
Council Member Gregorio Casar
Council Member Ann Kitchen
Council Member Jimmy Flannigan
Council Member Leslie Pool
Council Member Ellen Troxclair
Interim City Manager Elaine Hart
Assistant City Manager Robert Goode
City Attorney Ann Morgan
Interim Capital Contracting Officer Rolando Fernandez
Interim Chief Financial Officer Greg Canally
Interim Resource Recovery Department Director Sam Angoori
Purchasing Department Director James Scarboro
Zero Waste Advisory Commission Chair Gerard Acuna
Zero Waste Advisory Commission Staff Michael Sullivan
Ethics Review Commission Chair Peter Einhorn
Ethics Review Commission Secretary Robert Stratmann
Ethics Review Commission Staff Sue Palmer

RECOMMENDED REVISIONS, 9-28-2017

(MARK-UP)

ARTICLE 6. ~~—~~ ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-1012 — FINDINGS; PURPOSE; APPLICABILITY.

- (A) ~~—The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter article.~~
- (B) ~~—The Council finds that it is in the City's interest:~~
- ~~(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and~~
 - ~~(2) to further compliance with State law procurement requirements.~~
- (C) ~~The Council council intends that:~~
- ~~(1) each response is considered on the same basis as all others; and~~
 - ~~(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.~~
- (D) ~~A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~
- (E) ~~Unless this Article is invoked by Council, tThis article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property applies to all solicitations except:~~
- ~~(1) City social service funding;~~
 - ~~(2) City cultural arts funding;~~
 - ~~(3) federal, state or City block grant funding;~~
 - ~~(4) the sale or rental of real property;~~
 - ~~(5) interlocal contracts or agreements; and~~
 - ~~(6) solicitations specifically exempted from this article by council.~~
- (EE) ~~Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.~~
- (F) ~~Section 1-1-99 does not apply to this article. —A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-1024 — D—DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent, ~~including a person acting at the request of respondent, a person acting with the knowledge and consent of a respondent, or a person acting with any arrangement, coordination, or direction between the person and the respondent.~~ In order to make a representation, including but not limited to:
 - (a) a person acting at the request of respondent;
 - (b) a person acting with the knowledge and consent of a respondent;
 - (c) a person acting with any arrangement, coordination, or direction between the person and the respondent;
 - (d) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
 - (e) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and
 - (f) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.
- (2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation. ~~means the person identified in a City solicitation as the contact regarding the solicitation, or the authorized contact person's designee during the course of the no-contact period.~~
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (Definitions). ~~in this article means a person employed by the City.~~
- (4) CITY OFFICIAL is defined in Section 2-7-2 (-Definitions-).
- ~~(5) DIRECTOR means the director of a department to which the purchasing officer has delegated authority for enforcing this Chapter.~~
- (56) NO-CONTACT PERIOD means the period of time beginning at the date and time a response to a solicitation is due, as may be extended in the purchasing officer's discretion, and continuing through the earliest of the following:
 - (a) the date the last contract resulting from the solicitation is signed;
 - (b) 60 days following council authorization of the last contract resulting from the solicitation; or
 - (c) cancellation of the solicitation by the City.
- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department. ~~means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period continues during the time period between the withdrawal and reissue.~~
- (7) RESPONSE means a response to a solicitation.

(8) RESPONDENT means a person who makes a response to a City solicitation, even if that person subsequently withdraws its response or has been disqualified by the City, and includes:

- (a) a contractor for a respondent;
- (b) a subsidiary or parent of a respondent;
- (c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and
- (d) a subcontractor to a respondent in connection with that respondent's response.

~~means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:~~

- ~~(a) an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;~~
- ~~(b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and~~
- ~~(c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.~~

(9) REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:

- (a) related to a response;
- (b) made by a respondent or agent; and
- (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

~~means a communication related to a response to a council member, official, employee, or City representative that is intended to or that is reasonably likely to:~~

- ~~(a) provide information about the response;~~
- ~~(b) advance the interests of the respondent;~~
- ~~(c) discredit the response of any other respondent;~~
- ~~(d) encourage the City to withdraw the solicitation;~~
- ~~(e) encourage the City to reject all of the responses;~~
- ~~(f) convey a complaint about a particular solicitation; or~~
- ~~(g) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation.~~

(10) —SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;

- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E), means an opportunity to compete to conduct business with the City that requires City Council approval under City Charter Article VII Section 15 (Purchase Procedure).

Source: Ord. 20071206-045; Ord. 20111110-052.

~~§ 2-7-102 FINDINGS, PURPOSE, APPLICABILITY.~~

- ~~(A) The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter.~~
- ~~(B) The Council finds that it is in the City's interest:~~
 - ~~(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and~~
 - ~~(2) to further compliance with State law procurement requirements.~~
- ~~(C) The Council intends that:~~
 - ~~(1) each response is considered on the same basis as all others; and~~
 - ~~(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.~~
- ~~(D) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~
- ~~(E) Unless this Article is invoked by Council, this article does not apply to an opportunity to compete for City social service funding, City cultural arts funding, federal, state and City block grant funding, and the sale or rental of real property.~~
- ~~(F) A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

~~§ 2-7-103 -- PROHIBITED REPRESENTATIONS~~RESTRICTION ON CONTACTS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that is intended to or reasonably likely to:

- (1) provide substantive information about the response to which it relates;
- (2) advance the interests of the respondent with respect to the solicitation to which it relates;
- (3) discredit the response of any other respondent to the solicitation to which it relates;
- (4) encourage the City to reject all of the responses to the solicitation to which it relates;
- (5) convey a complaint about the solicitation to which it relates; or

- ~~(G) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates. (A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.~~
- ~~(B) During the no-contact period, a respondent may not make a representation to a City official or to a City employee other than to the authorized contact person. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.~~
- ~~(C) The prohibition of a representation during the no-contact period applies to a representation initiated by a respondent, and to a representation made in response to a communication initiated by a City official or a City employee other than the authorized contact person.~~
- ~~(D) If the City withdraws a solicitation or rejects all responses with a stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period shall expire after the ninetieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the ninety day period.~~
- ~~(E) For a single vendor award, the no-contact period shall expire when the first of the following occurs: contract is executed or solicitation is cancelled.~~
- ~~(F) For a multiple vendor award, the no-contact period shall expire when the last of the following occurs: all contracts are executed, negotiations have been fully terminated, or the ninetieth day after the solicitation is cancelled.~~
- ~~(G) The purchasing officer or the director may allow respondents to make representations to city employees or city representatives in addition to the authorized contact person for a solicitation that the purchasing officer or the director finds must be conducted in an expedited manner; an expedited solicitation is one conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer's or director's finding and additional city employees or city representatives who may be contacted must be included in the solicitation documents.~~
- ~~(H) Representations to an independent contractor hired by the City to conduct or assist with a solicitation will be treated as representations to a City employee.~~
- ~~(I) A current employee, director, officer, or member of a respondent, or a person related within the first degree of consanguinity or affinity to a current employee, director, officer or member of a respondent, is presumed to be an agent of the respondent for purposes of making a representation. This presumption is rebuttable by a preponderance of the evidence as determined by the purchasing officer or director.~~
- ~~(J) A respondent's representative is a person or entity acting on a respondent's behalf with the respondent's request and consent. For example, a respondent may email their membership list and ask members to contact council members on the respondent's behalf. The members are then acting per respondent's request and with their consent, and the members have become respondent representatives.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates solely to an existing contract between a respondent and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;
- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (Minority-Owned and Women-Owned Business Enterprise Procurement Program) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (Open Meetings Act);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) any communication occurring when making a contribution or expenditure as defined in Chapter 2-2 (Campaign Finance).

~~(A) If City seeks additional information from respondent, the respondent shall submit the representation in writing only to the authorized contact person. The authorized contact person shall distribute the written representation in accordance with the terms of the particular solicitation. This subsection does not permit a respondent to amend or add information to a response after the response deadline.~~

~~(B) If respondent wishes to send a complaint to the City, the respondent shall submit the complaint in writing only to the authorized contact person. The authorized contact person shall distribute a complaint regarding the process to members of the City council or members of the City board, to the director of the department that issued the solicitation, and to all respondents of the particular solicitation. However, the director or purchasing officer shall not permit distribution of any complaint that promotes or disparages the qualifications of a respondent, or that amends or adds information to a response. A determination of what constitutes promoting or disparaging the qualifications of a respondent or constitutes amending or adding information is at the director's or purchasing officer's sole discretion. Bid protests are not subject to this subsection. Documents related to a bid protest may not be forwarded to council under this subsection.~~

~~(C) If a respondent makes a written inquiry regarding a solicitation, the authorized contact person shall provide a written answer to the inquiry and distribute the inquiry and answer to all respondents of the particular solicitation.~~

~~(D) If a respondent is unable to obtain a response from the authorized contact person, the respondent may contact the director or purchasing officer as appropriate.~~

~~(E) A respondent may ask a purely procedural question, for example a question regarding the time or location of an event, or where information may be obtained, of a City employee other than the authorized contact person. This section does not permit a respondent to make suggestions or complaints about the contract process that constitute a representation to a City employee other than the authorized contact person. Notwithstanding this subsection, a respondent may not ask a procedural question of a councilmember, a councilmember's aide, or of a City board member except in a meeting held under the Texas Government Code, Chapter 551 (Open Meetings Act).~~

~~(F) This Article allows representations:~~

~~(1) made at a meeting convened by the authorized contact person, including meetings to evaluate responses or negotiate a contract;~~

~~(2) required by Financial Services Department protest procedures for vendors;~~

~~(3) made at a Financial Services Department protest hearing;~~

~~(4) provided to the Small & Minority Business Resources Department in order to obtain compliance with Chapter 29A-D (the Minority Owned and Women Owned Business Enterprise Procurement Program);~~

~~(5) made to the City Risk Management coordinator about insurance requirements for a solicitation;~~

~~(6) made in public at a meeting held under Texas Government Code, Chapter 551 (Open Meetings Act); or~~

~~(7) made from a respondent's attorney to an attorney in the Law Department in compliance with Texas Disciplinary Rules of Professional Conduct.~~

~~(G) Nothing in this article prohibits communication regarding the solicitation between or among City officials or City employees acting in their official capacity.~~

~~(H) A contribution or expenditure as defined in Chapter 2-2 (Campaign Finance) is not a representation.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 -- NOTICE/MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any City official or City employee, other than the authorized contact person, approaches a respondent for response or solicitation information during the no-contact period, the respondent is at jeopardy if he or she makes any representation in response.

(B) The authorized contact person for that solicitation shall notify council members in writing that the no-contact period for that solicitation is in effect.

(C) When a solicitation is issued that will be reviewed by a City board, the authorized contact person for that solicitation shall notify in writing each member of the board that the no-contact period for that solicitation is in effect.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 -- DISCLOSURE OF PROHIBITED REPRESENTATION ENFORCEMENT.

- (A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.
- (B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.
- (C) The purchasing officer has the authority to enforce this article through rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice and protest process for respondents disqualified pursuant to Section 2-7-107, including:
 - (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to protest the penalty imposed; and
 - (3) written notice of the right to request an impartial hearing process.
- ~~(1) If a City official or City employee receives a representation during the no contact period for a solicitation, the official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable.~~
- ~~(B) During the no contact period, a City official or City employee, except for the authorized contact person, shall not solicit a representation from a respondent.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 -- ENFORCEMENT PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same or similar project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same or similar project".
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City. (A) A respondent that makes a prohibited representation violates this article. If the authorized contact person for a solicitation is informed, or receives information, that a respondent has made a prohibited representation during the no contact period, the authorized contact person shall document the representation and notify the director or purchasing officer immediately.
- ~~(B) If the director or purchasing officer finds that a respondent has violated this article, the respondent is disqualified.~~
- ~~(C) If a respondent is disqualified for a solicitation and the solicitation is withdrawn or if all responses are rejected, the respondent is disqualified for a reissue of the same or similar solicitation for the~~

same or similar project. Section 2-7-103(D) does not limit the duration of the disqualification. The director or purchasing officer may determine what constitutes a "same or similar" project for purposes of this subsection.

(D) ~~The Financial Services Department and a department to which the purchasing officer has delegated purchasing authority shall adopt rules to administer and enforce this article. The rules must include the provision of written notice of disqualification to the respondent and a process to protest a disqualification.~~

(E) ~~This article is not subject to enforcement by the Ethics Review Commission.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-108 — CONTRACT VOIDABLE RECUSAL.

(A) During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.

(B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.

(C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.

~~If a contract is awarded to a respondent who has violated this article, the contract is voidable by the City.~~

Source: Ord. 20071206-045.

§ 2-7-109 — DEBARMENT.

(A) ~~If a respondent has been disqualified under this article more than two times in a sixty-month period, the purchasing officer shall debar a respondent from the sale of goods or services to the City for a period not to exceed three years, provided the respondent is given written notice and a hearing in advance of the debarment.~~

(B) ~~The Financial Services Department and any department to which the purchasing officer has delegated authority for enforcing this article shall adopt rules to administer and enforce this section. The rules must include a hearing process with written notice to the respondent.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-110 — NO CRIMINAL PENALTY.

~~Section 1-1-99 does not apply to this article.~~

Source: Ord. 20071206-045.

§ 2-7-111 — DIRECTOR DISCRETION.

~~A director has the discretion to apply this Article to any other competitive process not covered by this Article.~~

Source: Ord. 20111110-052.

This should be retained. Repeat Aho offenders may continue to violate the Aho disrupting the bid/RFI processes.



MEMORANDUM

TO: Mayor and Council

FROM: James Scarboro, Purchasing Officer *JS*

DATE: September 15, 2017

SUBJECT: Recommendations for Revisions to the Austin City Code,
Ch. 2-7, Article 6, Anti-Lobbying and Procurement

In accordance with Council Resolution no. 20170323-055 and subsequent recommendations made by Council's Waste Management Policy Work Group on July 21, 2017, staff from the Purchasing Office, Capital Contracting Office and the Law Department met throughout the summer to review and recommend revisions to Austin City Code, Ch. 2-7, Article 6, Anti-Lobbying and Procurement. In general, the recommended revisions clarify and consolidate the ordinance's contents, while addressing key areas discussed and recommended by the Work Group. Although the revision is broad, key elements of the changes include:

- 1) **No-Contact Period.** No-Contact Period is shortened; the starting point is delayed; the ending point is made more finite; and the ability to extend the period in the case of cancellation is removed. See Revised Section 2-7-102(6).
- 2) **Prohibited Representations.** The definition of Representation is clarified; and the descriptions of Prohibited Representations are also clarified. See Revised Section 2-7-102(10) and 2-7-103.
- 3) **Permitted Representations and Communications.** Representations and other Communications are consolidated and are clarified. See Revised Section 2-7-104.
- 4) **Mitigating Factors.** The ability to consider mitigating factors when determining a violation of the ordinance is added. E.g., Violation initiated by a City employee or official. See Revised Section 2-7-106(C).
- 5) **Debarment.** The debarment penalty, currently applicable to respondents with multiple violations, is removed. See Revised Section 2-7-107.
- 6) **Recusals.** City employees and officials that initiate a Prohibited Representation will be required to recuse themselves from any further involvement in the solicitation, recommending or authorizing any resulting contracts. See 2-7-108.

Purchasing Office
Recommendations for Revisions to the Austin City Code
September 15, 2017
Page 2

To assist Council in their review of these recommendations, attached are a number of documents to better illustrate the proposed changes. In addition to current, revised and mark-up versions of the ordinance, also included is a matrix depicting the major changes to the ordinance as listed above.

In anticipation of any change in the ordinance authorized by Council, staff have started working on a corresponding revision of the rules that further implement the ordinance. In general the revision of the rules will include a reorganization of contents such that each section of the ordinance has a corresponding section in the rules. Staff also intend to include standards for decision-making and examples to ensure consistent application and compliance with the ordinance. As soon as Council authorizes any revisions to the ordinance, staff will move to complete and publish these corresponding rules.

I welcome any questions in this regard, james.scarboro@austintexas.gov or (512) 974-2050.

cc: Elaine Hart, Interim City Manager
Robert Goode, Assistant City Manager
Greg Canally, Interim Chief Financial Officer
Anne Morgan, City Attorney
Rolando Fernandez, Interim Capital Contracting Officer
Chris Weema, Assistant City Attorney

Attachments:

Ch. 2-7, Article 6, Anti-Lobbying and Procurement (RECOMMENDATIONS, CLEAN)
Ch. 2-7, Article 6, Anti-Lobbying and Procurement (RECOMMENDATIONS, MARK-UP)
ALO REVISION – Comparison Matrix
Waste Management Policy Work Group – Recommendations (July 21, 2017)
Ch. 2-7, Article 6, Anti-Lobbying and Procurement (CURRENT)

RECOMMENDED REVISIONS, 9-28-2017

ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 – FINDINGS; PURPOSE; APPLICABILITY.

- (A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.
- (B) The council finds that it is in the City's interest:
 - (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The council intends that:
 - (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) This article applies to all solicitations except:
 - (1) City social service funding;
 - (2) City cultural arts funding;
 - (3) federal, state or City block grant funding;
 - (4) the sale or rental of real property;
 - (5) interlocal contracts or agreements; and
 - (6) solicitations specifically exempted from this article by council.
- (E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-102 – DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:
 - (a) a person acting at the request of respondent;
 - (b) a person acting with the knowledge and consent of a respondent;
 - (c) a person acting with any arrangement, coordination, or direction between the person and the respondent;

- (d) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
 - (e) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and
 - (f) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.
- (2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).
- (4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).
- (5) NO-CONTACT PERIOD means the period of time beginning at the date and time a response to a solicitation is due, as may be extended in the purchasing officer's discretion, and continuing through the earliest of the following:
 - (a) the date the last contract resulting from the solicitation is signed;
 - (b) 60 days following council authorization of the last contract resulting from the solicitation; or
 - (c) cancellation of the solicitation by the City.
- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.
- (7) RESPONSE means a response to a solicitation.
- (8) RESPONDENT means a person who makes a response to a City solicitation, even if that person subsequently withdraws its response or has been disqualified by the City, and includes:
 - (a) a contractor for a respondent;
 - (b) a subsidiary or parent of a respondent;
 - (c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and
 - (d) a subcontractor to a respondent in connection with that respondent's response.
- (9) REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:
 - (a) related to a response;
 - (b) made by a respondent or agent; and
 - (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

(10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;
- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 – PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that is intended to or reasonably likely to:

- (1) provide substantive information about the response to which it relates;
- (2) advance the interests of the respondent with respect to the solicitation to which it relates;
- (3) discredit the response of any other respondent to the solicitation to which it relates;
- (4) encourage the City to reject all of the responses to the solicitation to which it relates;
- (5) convey a complaint about the solicitation to which it relates; or
- (6) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates solely to an existing contract between a respondent and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;
- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;

- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) any communication occurring when making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 – MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 – ENFORCEMENT.

- (A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.
- (B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.
- (C) The purchasing officer has the authority to enforce this article through rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice and protest process for respondents disqualified pursuant to Section 2-7-107, including:
 - (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to protest the penalty imposed; and

- (3) written notice of the right to request a an impartial hearing process.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 – PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same or similar project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a “same or similar solicitation for the same or similar project”.
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-108 – RECUSAL.

- (A) During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.
- (B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.
- (C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.

RECOMMENDED REVISIONS, 9-28-2017

(MARK-UP)

ARTICLE 6. ~~—~~ ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-1012 — FINDINGS; PURPOSE; APPLICABILITY.

(A) ~~—The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapterarticle.~~

(B) ~~—The Council finds that it is in the City's interest:~~

- ~~(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and~~
- ~~(2) to further compliance with State law procurement requirements.~~

(C) ~~The Councilcouncil intends that:~~

- ~~(1) each response is considered on the same basis as all others; and~~
- ~~(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.~~

(D) ~~A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~

(E) ~~Unless this Article is invoked by Council, †This article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property, applies to all solicitations except:~~

- ~~(1) City social service funding;~~
- ~~(2) City cultural arts funding;~~
- ~~(3) federal, state or City block grant funding;~~
- ~~(4) the sale or rental of real property;~~
- ~~(5) interlocal contracts or agreements; and~~
- ~~(6) solicitations specifically exempted from this article by council.~~

(EF) ~~Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.~~

(F) ~~Section 1-1-99 does not apply to this article. — A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-1021 — D—DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent, ~~including a person acting at the request of respondent, a person acting with the knowledge and consent of a respondent, or a person acting with any arrangement, coordination, or direction between the person and the respondent.~~ in order to make a representation, including but not limited to:
- (a) a person acting at the request of respondent;
 - (b) a person acting with the knowledge and consent of a respondent;
 - (c) a person acting with any arrangement, coordination, or direction between the person and the respondent;
 - (d) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
 - (e) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and
 - (f) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.
- (2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation. ~~means the person identified in a City solicitation as the contact regarding the solicitation, or the authorized contact person's designee during the course of the no contact period.~~
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (Definitions). ~~in this article means a person employed by the City.~~
- (4) CITY OFFICIAL is defined in Section 2-7-2 (-Definitions-).
- ~~(5) DIRECTOR means the director of a department to which the purchasing officer has delegated authority for enforcing this Chapter.~~
- (56) NO-CONTACT PERIOD means the period of time beginning at the date and time a response to a solicitation is due, as may be extended in the purchasing officer's discretion, and continuing through the earliest of the following:
- (a) the date the last contract resulting from the solicitation is signed;
 - (b) 60 days following council authorization of the last contract resulting from the solicitation; or
 - (c) cancellation of the solicitation by the City.
- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department. ~~means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no contact period continues during the time period between the withdrawal and reissue.~~
- (7) RESPONSE means a response to a solicitation.

(8) RESPONDENT means a person who makes a response to a City solicitation, even if that person subsequently withdraws its response or has been disqualified by the City, and includes:

- (a) a contractor for a respondent;
- (b) a subsidiary or parent of a respondent;
- (c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and
- (d) a subcontractor to a respondent in connection with that respondent's response.

~~means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:~~

- ~~(a) an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;~~
- ~~(b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and~~
- ~~(c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.~~

(9) REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:

- (a) related to a response;
- (b) made by a respondent or agent; and
- (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

~~means a communication related to a response to a council member, official, employee, or City representative that is intended to or that is reasonably likely to:~~

- ~~(a) provide information about the response;~~
- ~~(b) advance the interests of the respondent;~~
- ~~(c) discredit the response of any other respondent;~~
- ~~(d) encourage the City to withdraw the solicitation;~~
- ~~(e) encourage the City to reject all of the responses;~~
- ~~(f) convey a complaint about a particular solicitation; or~~
- ~~(g) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation.~~

(10) —SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;

- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E), means an opportunity to compete to conduct business with the City that requires City Council approval under City Charter Article VII Section 15 (Purchase Procedure).

Source: Ord. 20071206-045; Ord. 20111110-052.

~~§ 2-7-102 FINDINGS, PURPOSE, APPLICABILITY.~~

- ~~(A) The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter.~~
- ~~(B) The Council finds that it is in the City's interest:~~
 - ~~(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and~~
 - ~~(2) to further compliance with State law procurement requirements.~~
- ~~(C) The Council intends that:~~
 - ~~(1) each response is considered on the same basis as all others; and~~
 - ~~(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.~~
- ~~(D) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~
- ~~(E) Unless this Article is invoked by Council, this article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property.~~
- ~~(F) A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 — PROHIBITED REPRESENTATIONS/RESTRICTION ON CONTACTS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that is intended to or reasonably likely to:

- (1) provide substantive information about the response to which it relates;
- (2) advance the interests of the respondent with respect to the solicitation to which it relates;
- (3) discredit the response of any other respondent to the solicitation to which it relates;
- (4) encourage the City to reject all of the responses to the solicitation to which it relates;
- (5) convey a complaint about the solicitation to which it relates; or

- ~~(6) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates. (A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.~~
- ~~(B) During the no-contact period, a respondent may not make a representation to a City official or to a City employee other than to the authorized contact person. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.~~
- ~~(C) The prohibition of a representation during the no-contact period applies to a representation initiated by a respondent, and to a representation made in response to a communication initiated by a City official or a City employee other than the authorized contact person.~~
- ~~(D) If the City withdraws a solicitation or rejects all responses with a stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period shall expire after the ninetieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the ninety-day period.~~
- ~~(E) For a single vendor award, the no-contact period shall expire when the first of the following occurs: contract is executed or solicitation is cancelled.~~
- ~~(F) For a multiple vendor award, the no-contact period shall expire when the last of the following occurs: all contracts are executed, negotiations have been fully terminated, or the ninetieth day after the solicitation is cancelled.~~
- ~~(G) The purchasing officer or the director may allow respondents to make representations to city employees or city representatives in addition to the authorized contact person for a solicitation that the purchasing officer or the director finds must be conducted in an expedited manner; an expedited solicitation is one conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer's or director's finding and additional city employees or city representatives who may be contacted must be included in the solicitation documents.~~
- ~~(H) Representations to an independent contractor hired by the City to conduct or assist with a solicitation will be treated as representations to a City employee.~~
- ~~(I) A current employee, director, officer, or member of a respondent, or a person related within the first degree of consanguinity or affinity to a current employee, director, officer or member of a respondent, is presumed to be an agent of the respondent for purposes of making a representation. This presumption is rebuttable by a preponderance of the evidence as determined by the purchasing officer or director.~~
- ~~(J) A respondent's representative is a person or entity acting on a respondent's behalf with the respondent's request and consent. For example, a respondent may email their membership list and ask members to contact council members on the respondent's behalf. The members are then acting per respondent's request and with their consent, and the members have become respondent representatives.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates solely to an existing contract between a respondent and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;
- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (Minority-Owned and Women-Owned Business Enterprise Procurement Program) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (Open Meetings Act);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) any communication occurring when making a contribution or expenditure as defined in Chapter 2-2 (Campaign Finance).

~~(A) If City seeks additional information from respondent, the respondent shall submit the representation in writing only to the authorized contact person. The authorized contact person shall distribute the written representation in accordance with the terms of the particular solicitation. This subsection does not permit a respondent to amend or add information to a response after the response deadline.~~

~~(B) If respondent wishes to send a complaint to the City, the respondent shall submit the complaint in writing only to the authorized contact person. The authorized contact person shall distribute a complaint regarding the process to members of the City council or members of the City board, to the director of the department that issued the solicitation, and to all respondents of the particular solicitation. However, the director or purchasing officer shall not permit distribution of any complaint that promotes or disparages the qualifications of a respondent, or that amends or adds information to a response. A determination of what constitutes promoting or disparaging the qualifications of a respondent or constitutes amending or adding information is at the director's or purchasing officer's sole discretion. Bid protests are not subject to this subsection. Documents related to a bid protest may not be forwarded to council under this subsection.~~

~~(C) If a respondent makes a written inquiry regarding a solicitation, the authorized contact person shall provide a written answer to the inquiry and distribute the inquiry and answer to all respondents of the particular solicitation.~~

- ~~(D) If a respondent is unable to obtain a response from the authorized contact person, the respondent may contact the director or purchasing officer as appropriate.~~
- ~~(E) A respondent may ask a purely procedural question, for example a question regarding the time or location of an event, or where information may be obtained, of a City employee other than the authorized contact person. This section does not permit a respondent to make suggestions or complaints about the contract process that constitute a representation to a City employee other than the authorized contact person. Notwithstanding this subsection, a respondent may not ask a procedural question of a councilmember, a councilmember's aide, or of a City board member except in a meeting held under the Texas Government Code, Chapter 551 (Open Meetings Act).~~
- ~~(F) This Article allows representations:~~
- ~~(1) made at a meeting convened by the authorized contact person, including meetings to evaluate responses or negotiate a contract;~~
 - ~~(2) required by Financial Services Department protest procedures for vendors;~~
 - ~~(3) made at a Financial Services Department protest hearing;~~
 - ~~(4) provided to the Small & Minority Business Resources Department in order to obtain compliance with Chapter 29A-D (the Minority Owned and Women Owned Business Enterprise Procurement Program);~~
 - ~~(5) made to the City Risk Management coordinator about insurance requirements for a solicitation;~~
 - ~~(6) made in public at a meeting held under Texas Government Code, Chapter 551 (Open Meetings Act); or~~
 - ~~(7) made from a respondent's attorney to an attorney in the Law Department in compliance with Texas Disciplinary Rules of Professional Conduct.~~
- ~~(G) Nothing in this article prohibits communication regarding the solicitation between or among City officials or City employees acting in their official capacity.~~
- ~~(H) A contribution or expenditure as defined in Chapter 2-2 (Campaign Finance) is not a representation.~~
- Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 — NOTICEMODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any City official or City employee, other than the authorized contact person, approaches a respondent for response or solicitation information during the no contact period, the respondent is at jeopardy if he or she makes any representation in response.

~~(B) The authorized contact person for that solicitation shall notify council members in writing that the no contact period for that solicitation is in effect.~~

~~(C) When a solicitation is issued that will be reviewed by a City board, the authorized contact person for that solicitation shall notify in writing each member of the board that the no contact period for that solicitation is in effect.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 — DISCLOSURE OF PROHIBITED REPRESENTATION ENFORCEMENT.

- (A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.
- (B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.
- (C) The purchasing officer has the authority to enforce this article through rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice and protest process for respondents disqualified pursuant to Section 2-7-107, including:
 - (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to protest the penalty imposed; and
 - (3) written notice of the right to request an impartial hearing process.
- ~~(A) If a City official or City employee receives a representation during the no contact period for a solicitation, the official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable.~~
- ~~(B) During the no contact period, a City official or City employee, except for the authorized contact person, shall not solicit a representation from a respondent.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 — ENFORCEMENT PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same or similar project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same or similar project".
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City. ~~(A) A respondent that makes a prohibited representation violates this article. If the authorized contact person for a solicitation is informed, or receives information, that a respondent has made a prohibited representation during the no contact period, the authorized contact person shall document the representation and notify the director or purchasing officer immediately.~~
- ~~(B) If the director or purchasing officer finds that a respondent has violated this article, the respondent is disqualified.~~
- ~~(C) If a respondent is disqualified for a solicitation and the solicitation is withdrawn or if all responses are rejected, the respondent is disqualified for a reissue of the same or similar solicitation for the~~

~~same or similar project. Section 2-7-103(D) does not limit the duration of the disqualification. The director or purchasing officer may determine what constitutes a "same or similar" project for purposes of this subsection.~~

~~(D) The Financial Services Department and a department to which the purchasing officer has delegated purchasing authority shall adopt rules to administer and enforce this article. The rules must include the provision of written notice of disqualification to the respondent and a process to protest a disqualification.~~

~~(E) This article is not subject to enforcement by the Ethics Review Commission.~~

~~Source: Ord. 20071206-045; Ord. 20111110-052.~~

~~§ 2-7-108 — CONTRACT VOIDABLE RECUSAL.~~

~~(A) During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~

~~(B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~

~~(C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

~~If a contract is awarded to a respondent who has violated this article, the contract is voidable by the City.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-109 — DEBARMENT.~~

~~(A) If a respondent has been disqualified under this article more than two times in a sixty month period, the purchasing officer shall debar a respondent from the sale of goods or services to the City for a period not to exceed three years, provided the respondent is given written notice and a hearing in advance of the debarment.~~

~~(B) The Financial Services Department and any department to which the purchasing officer has delegated authority for enforcing this article shall adopt rules to administer and enforce this section. The rules must include a hearing process with written notice to the respondent.~~

~~Source: Ord. 20071206-045; Ord. 20111110-052.~~

~~§ 2-7-110 — NO CRIMINAL PENALTY.~~

~~Section 1-1-99 does not apply to this article.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-111 — DIRECTOR DISCRETION.~~

~~A director has the discretion to apply this Article to any other competitive process not covered by this Article.~~

~~Source: Ord. 20111110-052.~~

ALO REVISION – Comparison Matrix

Ch. 2-7, Article 6 – Anti-Lobbying and Procurement

Element	Current Language	Recommended Language	Discussion
No Contact Period	<p>Start: Date solicitation is issued</p> <p>End: - Date contract is signed, or - Date solicitation is cancelled</p> <p>Extendable: Yes</p> <p>Condition: If the solicitation is canceled with the stated intention to reissue, the no-contact period continues during the time period between the withdrawal and reissue for up to 90 days.</p>	<p>Start: Date and time a response to a solicitation is due</p> <p>End: - Date the contract is signed; - Date solicitation is cancelled; or - 60-days following Council authorization</p> <p>Extendable: No</p>	<ul style="list-style-type: none"> Starting the No-Contact period at the solicitation's due date allows staff to know which respondents are subject to the ordinance. Eliminating the ability to extend and setting a finite expiration eliminates confusion as to the ending of the No-Contact Period. Shortening this period and adding certainty, regarding those subject to the ordinance and when the period ends, will make the No-Contact List more meaningful to staff, Council and the public.
Prohibited Representations	<p>Prohibits representations that:</p> <ul style="list-style-type: none"> provide substantive information about a response advance the interests of the respondent with respect to the solicitation discredit the response of any other respondent to the solicitation encourage the City to reject all of the responses to the solicitation to which it relates; convey a complaint about the solicitation asks, influences, or persuades the solicitation process <p>Permits representations only through the authorized contact person.</p> <ul style="list-style-type: none"> Prohibits representations to a City officials or to a City employees Representations made before a Response is submitted are also prohibited Prohibition also applies to representations initiated by City officials or City employees If the solicitation is cancelled with the intention of re-soliciting, the No-Contact Period continues for 90-days after cancellation In the event of multiple awards, the No-Contact Period continues until the last contract is signed Provision for allowing representations under emergency circumstances 	<p>Prohibits representations that:</p> <ul style="list-style-type: none"> provide substantive information about a response advance the interests of the respondent with respect to the solicitation discredit the response of any other respondent to the solicitation encourage the City to reject all of the responses to the solicitation to which it relates; convey a complaint about the solicitation asks, influences, or persuades the solicitation process 	<ul style="list-style-type: none"> Abbreviates and makes more concise the definition and prohibitions associated with representations Some elements were actually clarifications of the No-Contact Period and Permitted Representations, and were moved

	<ul style="list-style-type: none"> Prohibits representations made to a contractor hired by the City to assist with a solicitation Representations made by agents of a respondent are prohibited Clarifies definition of respondent's agent 		
Permitted Representations and Communications	<p>Allow Representations:</p> <ul style="list-style-type: none"> Made to the authorized contact person. Describing what the authorized contact person does with the respondent's communications Disallowing a respondent from changing their offer through a communication with the authorized contact person. Permitting complaints submitted through the authorized contact person Limiting the Purchasing Officer from distributing complaints that are derogatory to other offerors Excluding protests from the complaint distribution process Allowing a respondent to contact the purchasing officer of the authorized contact person does not respond Ask procedural questions to other City employees Prohibiting procedural questions to City officials or their staff Made at a public meeting Made during negotiations Made during protest hearings Made to the Small & Minority Business Resources Department regarding subcontract goals Made to the City Risk Management coordinator about insurance requirements Made from the respondent's attorney to the City's Law Department Allows City employees and officials to discuss the solicitation Establishes that campaign contributions are not representations 	<p>Allow Representations:</p> <ul style="list-style-type: none"> Made to the authorize contact person Made at a public meeting Made during protest hearings Made to the Small & Minority Business Resources Department regarding subcontract goals Made to the City Risk Management coordinator about insurance requirements Made from the respondent's attorney to the City's Law Department Establishes that campaign contributions not a representations Clarifies that communications about an existing contract is not a representation, even if the scope of the current contract is the same or similar to the solicitation's scope 	<ul style="list-style-type: none"> Some permitted representations were repetitive and were consolidated Other permitted representations were not applicable to this section and were removed Clarifications regarding existing contracts and campaign contributions were left in
Mitigating Factors	The Purchasing Officer was not allowed to consider mitigating factors when determining a violation	The Purchasing Officer may consider mitigating factors when determining a violation, e.g., a representation initiated by a City employee or official	Allows the enforce the ordinance, taking into consideration factors that may have been outside the offeror's control
Debarment	Respondents found to have committed multiple violations within a five year period are to be debarred from doing business with the City for up to three years.	There are no references to debarment	As the City has no record of debarring any vendor for violating the ordinance, this penalty is largely a deterrent only
Recusals	There are no prohibitions against City employees or officials who initiate a prohibited representations from vendors that result in violations of the ordinance.	City employees or officials that initiate a prohibited representation shall recuse themselves from further participation in the solicitation, recommending or authorizing any resulting contract	This element was in response to feedback from the Work Group seeking to share more of the responsibility of compliance with the ordinance with City staff and officials.

Recommendations of the Waste Management Policy Working Group

During the fall of 2016 and spring of 2017, the City Council rejected a number of staff-recommended contracts in response to objections from the Zero Waste Advisory Commission and other stakeholders. In March, Council approved Resolution No. 20170323-055 to form a Working Group to surface concerns voiced by industry representatives, commissioners and citizen advocates.

More specifically, the Working Group – Council Members Pool (chair), Alison Alter, Delia Garza, and Ann Kitchen – was charged with providing policy guidance necessary to facilitate city action related to the solicitations that stalled when they came before Council, including 1) Citywide refuse, recycling, organics, and special waste collections from City facilities; 2) Organics processing services, and 3) Management of biosolids reuse. Each issue was carefully considered with the City's 2040 Zero Waste goals in mind.

Efforts to transform the City of Austin's waste management services to a zero-waste reduce/reuse/recycle philosophy began decades ago. Over time, the City developed a wide range of services designed to transform waste into resources, making the most of their continued utility, while keeping our community clean and minimizing the amount of material hauled to area landfills. The City's Community Climate Plan includes a resource recovery goal to achieve Zero Waste by 2040, which means reducing the amount of trash sent to landfills by 90 percent.

The Working Group appreciates the opportunity to examine these issues that are so valuable to our environment, our economy, and public health and safety. We are thankful to staff from Austin Resource Recovery, Austin Water, and the Purchasing Office for providing the necessary resources and support to the Working Group. We are especially thankful to the range of stakeholders – vendors, representatives of the Zero Waste Advisory Commission and Water and Wastewater Commission, and nonprofit advocacy groups – who joined us at the table for a series of robust discussions, artfully moderated by Larry Schooler. (See Appendix for stakeholder participants.)

To ensure all stakeholders, including vendors who had recently bid on contracts, played an active role in the conversation, City Council voted to temporarily suspend the Anti-Lobbying Ordinance. The Working Group recommends continuing the suspension until Council considers draft amendments to the ALO in late September.

This report summarizes the policy questions addressed in the four public meetings and provides recommendations to Council, along with policy justifications for improvements or continuation of existing ordinances or practices and provides recommendations to Council, along with policy justifications for improvements or continuation of existing ordinances or practices.

1. Should the city continue to competitively solicit waste management contracts? Yes, with some procedural revisions.

Justification:

- A competitive process provides an opportunity for small businesses to flourish in this industry and for the local economy to grow; it nurtures diversity of providers and prevents monopolies. Such capacity growth is key for achieving our Zero Waste goals.
- The City Charter requires competitive bidding except in case of an emergency involving public health and safety (City Charter Article 7, Section 15).
- Clauses in existing contracts which some argue allow for a non-competitive approach are designed to address emergency situations only.
- There are cost considerations if solicitations are not competitively bid.

Recommendations to Staff:

- Within waste management matrices, revise the definition of “local” to more accurately represent local business presence. The current point allowance favors businesses with offices within the city limits regardless of the type, nature, or history of their presence in the local community. At the same time it penalizes businesses with headquarters just outside the city limits but with substantial business presence in the Austin Area.
- Staff should strictly apply the health and public safety exemption in accordance with state statute. Using this exemption in non-urgent or non-emergency situations could have a chilling effect on potential vendor participation.
- Check all draft solicitations for alignment with policy goals such as zero waste and create a process for the ZWAC and WWC to provide input on policy alignment of the draft prior to issuing the solicitation.

2. Should materials be directed to or away from certain landfills in future solicitations? Yes, materials should be directed to or away from certain landfills through the use of a landfill criteria matrix that reflects Council’s environmental priorities.

Justification: Prior Council has established environmental priorities relative to landfills. The City is in a unique position to be a culture maker around environmental practices. Although the City cannot single handedly affect the closure of any one landfill, the City can uphold and apply best positive practices relative to area sustainability, adhering to (Council) policy with contract

requirements and designations. A matrix reflecting these best positive practices would provide a transparent scoring mechanism to determine the use of any particular landfill.

Recommendation to Staff: Direct waste diversion by criteria not by landfill. Per previous Council priorities and issues enumerated during the Waste Working Group's meetings with stakeholders, staff should develop criteria for waste diversion to include considerations such as: community impact and social equity, carbon footprint, amount and type of waste, existing levels of hazardous materials at landfill. Staff should prepare this matrix and it should come before the Council for approval before implementation.

3. Should some contract services be consolidated? A cost analysis is necessary to decide this question.

Justification: Consolidation may create economies of scale and better reporting capacity; however, it also may have undesired effects on the ability of small vendors to compete. More information is needed. Austin Energy, the Convention Center and Aviation have tailored non- consolidated contracts because of their specialized waste; other departments may have like services.

Recommendations to Staff:

- Perform a cost analysis on the impact of consolidating "like" services which includes potential impacts on local business.
- A policy based on the cost analysis should be developed with input from ZWAC.

4. Should the City set diversion requirements for waste management contracts? No.

Justification: Diversion responsibility should stay with the generator because of cost and need for culture change with the generator. The generators in this instance are City Departments. Risk in this instance is most appropriately borne by the waste generator. During emergencies diversion is not required (though diversion is desirable where feasible).

Recommendation: Staff should examine options to build point incentives into contracts for vendor-based generation. Vendors should not be required to bear responsibility, but can be scored accordingly if they are willing to do so. Increased vigilance on generator diversion rates needs to occur.

5. Is there a preferred way to manage utility poles? Reuse, store until further beneficial reuses are found. Seek alternative source for new poles to the extent possible.

Justification: New reuse possibilities were not determined during the working group tenure and will need to continue to be explored. Both the input and the exit process present an opportunity for improvement.

Recommendations to Staff: Staff should continue research on possible reuses for utility poles. Departments should implement a storage plan until beneficial reuses are found. A less contaminated type of pole should also be solicited if it exists and is cost feasible.

6. Should Austin Resource Recovery provide special events services? Leave as is for now; conduct cost of service study to determine changes.

Justification:

- The City maintains a list of vendors and acts only as the service provider of last resort for special events held in the city. Vendor of last resort is an appropriate role for the City. In this role, the City would provide service (using a vendor) only if a special event could not secure a vendor from the list. In this case the City would be paid for the service at Council adopted rates.
- When the City sponsors or co-sponsors a special event, it provides special events services, allowing fees to be waived. Even in these cases, the City contracts with private service providers.
- Waived fees have an impact on ARR rates and city budgets though ARR is an enterprise fund.

Recommendation to Staff: Conduct a service study to determine appropriate reimbursement rates for the City's role as vendor of last resort and whether fee waivers regarding waste services for special events are sustainable by relevant departments. This cost of service study can inform budget considerations.

7. Is there a preferred policy for bio-solids management? The Working Group agrees the Dillo Dirt program is important. We recommend retaining it, and adopting the October 2016 policy recommendations of the WWW/ZWAC Joint Working Group (Exhibit A), with some additional recommendations noted below.

Justification: Although current procedures generally conform to our Zero Waste goals, the Working Group wants to ensure there is a clear policy in place to provide direction that remains consistent with our goals.

Recommendations to Staff:

- Representative samples of compost will be collected and tested by city staff or an independent third party for stability and maturity;
- Austin Water should develop plans to return to normal operations at the termination of "emergency condition," and
- Per the joint working group recommendation, the working group recommends 100% of biosolids will be converted to compost, while allowing for a diverse range of composts in order to appeal to the widest range of potential markets.

8. Should the City waive the anti-lobbying ordinance (ALO)? No, but revisions are required per recommendations below.

Justification: During working group discussions, both city staff and stakeholders identified a number of ways in which we could clarify and improve the ALO to strengthen working

relationships with waste management vendors and the City. Since the ALO applies to all vendors regardless of industry, any changes to the ALO would apply to the City's interactions with all vendors. In order to reach a healthier and more transparent working climate with all City vendors, the working group recommends the following.

Recommendations to Staff:

Recommendations on the application of the ordinance, duration and allowable communications:

- Apply the anti-lobbying ordinance only to the solicitation. Vendors may communicate on all other matters without violating the ALO.
- Apply the ALO from the time a Request for Proposals (RFP) is released through Council's vote on executing the contract. Should an RFP be pulled down, then the ordinance does not apply during the timeframe the RFP is pulled down
- Narrow the definition of "Representations" to target lobbying. For instance, if staff tells a vendor that the ALO does not apply and a communication is allowable - then the vendor cannot later be disqualified as violating the ordinance by the communication.
- Add communications regarding existing contracts to "Permitted Communications."

Recommendations on enforcement, appeals and complaints:

- Develop a body of rules in a companion regulatory document to the ALO that defines enforcement, appeal, complaint and debarment procedures.
- The companion document should:
 1. Clarify the current definition of "Representation" and what triggers debarment
 2. Clarify procedures for determining violations, judgment, and penalty enforcement and incorporate an option to engage a third-party reviewer such as the Ethics Review Commission to determine violations, judgment, and penalty enforcement.
 3. Clarify the process for submitting and facilitating complaints.
 4. City Purchasing and City Legal should develop this companion document for approval by Council and prepare any language updates to the ALO that might be required to allow for adopted rules in the companion document.

Other recommendations:

- The existing ALO should remain suspended until Council approves proposed revisions. Staff from Law and Purchasing are working on draft language to address issues identified in discussions with stakeholders. Estimated date for Council approval is the end of September.
- Revisions to the ALO may require continued participation from stakeholders. The Purchasing Office should receive and compile further stakeholder input for Council and will work with adopted input as determined by Council.

CURRENT ORDINANCE

ARTICLE 6. - ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 - DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent, including a person acting at the request of respondent, a person acting with the knowledge and consent of a respondent, or a person acting with any arrangement, coordination, or direction between the person and the respondent.
- (2) AUTHORIZED CONTACT PERSON means the person identified in a City solicitation as the contact regarding the solicitation, or the authorized contact person's designee during the course of the no-contact period.
- (3) CITY EMPLOYEE in this article means a person employed by the City.
- (4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).
- (5) DIRECTOR means the director of a department to which the purchasing officer has delegated authority for enforcing this Chapter.
- (6) NO-CONTACT PERIOD means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period continues during the time period between the withdrawal and reissue.
- (7) RESPONSE means a response to a solicitation.
- (8) RESPONDENT means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:
 - (a) an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;
 - (b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and
 - (c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.
- (9) REPRESENTATION means a communication related to a response to a council member, official, employee, or City representative that is intended to or that is reasonably likely to:
 - (a) provide information about the response;
 - (b) advance the interests of the respondent;
 - (c) discredit the response of any other respondent;
 - (d) encourage the City to withdraw the solicitation;
 - (e) encourage the City to reject all of the responses;
 - (f) convey a complaint about a particular solicitation; or
 - (g) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider,

or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation.

- (10) SOLICITATION means an opportunity to compete to conduct business with the City that requires City Council approval under City Charter Article VII Section 15 (*Purchase Procedure*).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-102 - FINDINGS; PURPOSE; APPLICABILITY.

- (A) The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter.
- (B) The Council finds that it is in the City's interest:
 - (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The Council intends that:
 - (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.
- (E) Unless this Article is invoked by Council, this article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property.
- (F) A representation excludes communication between a City of Austin attorney and a respondent's attorney.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 - RESTRICTION ON CONTACTS.

- (A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.
- (B) During the no-contact period, a respondent may not make a representation to a City official or to a City employee other than to the authorized contact person. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.
- (C) The prohibition of a representation during the no-contact period applies to a representation initiated by a respondent, and to a representation made in response to a communication initiated by a City official or a City employee other than the authorized contact person.
- (D) If the City withdraws a solicitation or rejects all responses with a stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period shall expire after the ninetieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the ninety day period.
- (E) For a single vendor award, the no-contact period shall expire when the first of the following occurs: contract is executed or solicitation is cancelled.

- (F) For a multiple vendor award, the no-contact period shall expire when the last of the following occurs: all contracts are executed, negotiations have been fully terminated, or the ninetieth day after the solicitation is cancelled.
- (G) The purchasing officer or the director may allow respondents to make representations to city employees or city representatives in addition to the authorized contact person for a solicitation that the purchasing officer or the director finds must be conducted in an expedited manner; an expedited solicitation is one conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer's or director's finding and additional city employees or city representatives who may be contacted must be included in the solicitation documents.
- (H) Representations to an independent contractor hired by the City to conduct or assist with a solicitation will be treated as representations to a City employee.
- (I) A current employee, director, officer, or member of a respondent, or a person related within the first degree of consanguinity or affinity to a current employee, director, officer or member of a respondent, is presumed to be an agent of the respondent for purposes of making a representation. This presumption is rebuttable by a preponderance of the evidence as determined by the purchasing officer or director.
- (J) A respondent's representative is a person or entity acting on a respondent's behalf with the respondent's request and consent. For example, a respondent may email their membership list and ask members to contact council members on the respondent's behalf. The members are then acting per respondent's request and with their consent, and the members have become respondent representatives.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-104 - PERMITTED REPRESENTATIONS.

- (A) If City seeks additional information from respondent, the respondent shall submit the representation in writing only to the authorized contact person. The authorized contact person shall distribute the written representation in accordance with the terms of the particular solicitation. This subsection does not permit a respondent to amend or add information to a response after the response deadline.
- (B) If respondent wishes to send a complaint to the City, the respondent shall submit the complaint in writing only to the authorized contact person. The authorized contact person shall distribute a complaint regarding the process to members of the City council or members of the City board, to the director of the department that issued the solicitation, and to all respondents of the particular solicitation. However, the director or purchasing officer shall not permit distribution of any complaint that promotes or disparages the qualifications of a respondent, or that amends or adds information to a response. A determination of what constitutes promoting or disparaging the qualifications of a respondent or constitutes amending or adding information is at the director's or purchasing officer's sole discretion. Bid protests are not subject to this subsection. Documents related to a bid protest may not be forwarded to council under this subsection.
- (C) If a respondent makes a written inquiry regarding a solicitation, the authorized contact person shall provide a written answer to the inquiry and distribute the inquiry and answer to all respondents of the particular solicitation.
- (D) If a respondent is unable to obtain a response from the authorized contact person, the respondent may contact the director or purchasing officer as appropriate.
- (E) A respondent may ask a purely procedural question, for example a question regarding the time or location of an event, or where information may be obtained, of a City employee other than the authorized contact person. This section does not permit a respondent to make suggestions or complaints about the contract process that constitute a representation to a City employee other than the authorized contact person. Notwithstanding this subsection, a respondent may not ask a

procedural question of a councilmember, a councilmember's aide, or of a City board member except in a meeting held under the Texas Government Code, Chapter 551 (*Open Meetings Act*).

(F) This Article allows representations:

- (1) made at a meeting convened by the authorized contact person, including meetings to evaluate responses or negotiate a contract;
- (2) required by Financial Services Department protest procedures for vendors;
- (3) made at a Financial Services Department protest hearing;
- (4) provided to the Small & Minority Business Resources Department in order to obtain compliance with Chapter 2-9A-D (*the Minority-Owned and Women-Owned Business Enterprise Procurement Program*);
- (5) made to the City Risk Management coordinator about insurance requirements for a solicitation;
- (6) made in public at a meeting held under Texas Government Code, Chapter 551 (*Open Meetings Act*); or
- (7) made from a respondent's attorney to an attorney in the Law Department in compliance with Texas Disciplinary Rules of Professional Conduct.

(G) Nothing in this article prohibits communication regarding the solicitation between or among City officials or City employees acting in their official capacity.

(H) A contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*) is not a representation.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 - NOTICE.

- (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any City official or City employee, other than the authorized contact person, approaches a respondent for response or solicitation information during the no-contact period, the respondent is at jeopardy if he or she makes any representation in response.
- (B) The authorized contact person for that solicitation shall notify council members in writing that the no-contact period for that solicitation is in effect.
- (C) When a solicitation is issued that will be reviewed by a City board, the authorized contact person for that solicitation shall notify in writing each member of the board that the no-contact period for that solicitation is in effect.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 - DISCLOSURE OF PROHIBITED REPRESENTATION.

- (A) If a City official or City employee receives a representation during the no-contact period for a solicitation, the official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable.
- (B) During the no-contact period, a City official or City employee, except for the authorized contact person, shall not solicit a representation from a respondent.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 - ENFORCEMENT.

- (A) A respondent that makes a prohibited representation violates this article. If the authorized contact person for a solicitation is informed, or receives information, that a respondent has made a prohibited representation during the no-contact period, the authorized contact person shall document the representation and notify the director or purchasing officer immediately.
- (B) If the director or purchasing officer finds that a respondent has violated this article, the respondent is disqualified.
- (C) If a respondent is disqualified for a solicitation and the solicitation is withdrawn or if all responses are rejected, the respondent is disqualified for a reissue of the same or similar solicitation for the same or similar project. Section 2-7-103(D) does not limit the duration of the disqualification. The director or purchasing officer may determine what constitutes a "same or similar" project for purposes of this subsection.
- (D) The Financial Services Department and a department to which the purchasing officer has delegated purchasing authority shall adopt rules to administer and enforce this article. The rules must include the provision of written notice of disqualification to the respondent and a process to protest a disqualification.
- (E) This article is not subject to enforcement by the Ethics Review Commission.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-108 - CONTRACT VOIDABLE.

If a contract is awarded to a respondent who has violated this article, the contract is voidable by the City.

Source: Ord. 20071206-045.

§ 2-7-109 - DEBARMENT.

- (A) If a respondent has been disqualified under this article more than two times in a sixty month period, the purchasing officer shall debar a respondent from the sale of goods or services to the City for a period not to exceed three years, provided the respondent is given written notice and a hearing in advance of the debarment.
- (B) The Financial Services Department and any department to which the purchasing officer has delegated authority for enforcing this article shall adopt rules to administer and enforce this section. The rules must include a hearing process with written notice to the respondent.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-110 - NO CRIMINAL PENALTY.

Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045.

§ 2-7-111 - DIRECTOR DISCRETION.

A director has the discretion to apply this Article to any other competitive process not covered by this Article.

Source: Ord. 20111110-052.

Recommendations of the Waste Management Policy Working Group

During the fall of 2016 and spring of 2017, the City Council rejected a number of staff-recommended contracts in response to objections from the Zero Waste Advisory Commission and other stakeholders. In March, Council approved Resolution No. 20170323-055 to form a Working Group to surface concerns voiced by industry representatives, commissioners and citizen advocates.

ers Pool (chair), Alison Alter, Delia Garza, guidance necessary to facilitate city action related to the solicitations that stalled when they came before Council, including 1) Citywide refuse, recycling, organics, and special waste collections from City facilities; 2) Organics processing services, and 3) Management of biosolids reuse. Each issue was carefully considered

waste management services to a zero-waste reduce/reuse/recycle philosophy began decades ago. Over time, the City developed a wide range of services designed to transform waste into resources, making the most of their continued utility, while keeping our community clean and minimizing the amount of material ate Plan includes a resource recovery goal to achieve Zero Waste by 2040, which means reducing the amount of trash sent to landfills by 90 percent.

The Working Group appreciates the opportunity to examine these issues that are so valuable to our environment, our economy, and public health and safety. We are thankful to staff from Austin Resource Recovery, Austin Water, and the Purchasing Office for providing the necessary resources and support to the Working Group. We are especially thankful to the range of Zero Waste Advisory Commission and Water and Wastewater Commission, and nonprofit advocacy series of robust discussions, artfully moderated by Larry Schooler. (See Appendix for stakeholder participants.)

To ensure all stakeholders, including vendors who had recently bid on contracts, played an active role in the conversation, City Council voted to temporarily suspend the Anti-Lobbying Ordinance. The Working Group recommends continuing the suspension until Council considers draft amendments to the ALO in late September.

This report summarizes the policy questions addressed in the four public meetings and provides recommendations to Council, along with policy justifications for improvements or continuation of existing ordinances or practices and provides recommendations to Council, along with policy justifications for improvements or continuation of existing ordinances or practices.

1. Should the city continue to competitively solicit waste management contracts? Yes, with some procedural revisions.

Justification:

- A competitive process provides an opportunity for small businesses to flourish in this industry and for the local economy to grow; it nurtures diversity of providers and prevents monopolies. Such capacity growth is key for achieving our Zero Waste goals.
- The City Charter requires competitive bidding except in case of an emergency involving public health and safety (City Charter Article 7, Section 15).
- Clauses in existing contracts which some argue allow for a non-competitive approach are designed to address emergency situations only.
- There are cost considerations if solicitations are not competitively bid.

Recommendations to Staff:

- represent local business presence. The current point allowance favors businesses with offices within the city limits regardless of the type, nature, or history of their presence in the local community. At the same time it penalizes businesses with headquarters just outside the city limits but with substantial business presence in the Austin Area.
- Staff should strictly apply the health and public safety exemption in accordance with state statute. Using this exemption in non-urgent or non-emergency situations could have a chilling effect on potential vendor participation.
- Check all draft solicitations for alignment with policy goals such as zero waste and create a process for the ZWAC and WWC to provide input on policy alignment of the draft prior to issuing the solicitation.

2. Should materials be directed to or away from certain landfills in future solicitations? Yes, materials should be directed to or away from certain landfills through the use of a landfill

Justification: Prior Council has established environmental priorities relative to landfills. The City is in a unique position to be a culture maker around environmental practices. Although the City cannot single handedly affect the closure of any one landfill, the City can uphold and apply best positive practices relative to area sustainability, adhering to (Council) policy with contract

requirements and designations. A matrix reflecting these best positive practices would provide a transparent scoring mechanism to determine the use of any particular landfill.

Recommendation to Staff: Direct waste diversion by criteria not by landfill. Per previous Council priorities and issues enumerated during the Waste Working Group's meetings with stakeholders, staff should develop criteria for waste diversion to include considerations such as: community impact and social equity, carbon footprint, amount and type of waste, existing levels of hazardous materials at landfill. Staff should prepare this matrix and it should come before the Council for approval before implementation.

3. Should some contract services be consolidated? A cost analysis is necessary to decide this question.

Justification: Consolidation may create economies of scale and better reporting capacity; however, it also may have undesired effects on the ability of small vendors to compete. More information is needed. Austin Energy, the Convention Center and Aviation have tailored non-consolidated contracts because of their specialized waste; other departments may have like services.

Recommendations to Staff:

- Perform a cost analysis on the impact of consolidating "like" services which includes potential impacts on local business.
- A policy based on the cost analysis should be developed with input from ZWAC.

4. Should the City set diversion requirements for waste management contracts? No.

Justification: Diversion responsibility should stay with the generator because of cost and need for culture change with the generator. The generators in this instance are City Departments. Risk in this instance is most appropriately borne by the waste generator. During emergencies diversion is not required (though diversion is desirable where feasible).

Recommendation: Staff should examine options to build point incentives into contracts for vendor-based generation. Vendors should not be required to bear responsibility, but can be scored accordingly if they are willing to do so. Increased vigilance on generator diversion rates needs to occur.

5. Is there a preferred way to manage utility poles? Reuse, store until further beneficial reuses are found. Seek alternative source for new poles to the extent possible.

Justification: New reuse possibilities were not determined during the working group tenure and will need to continue to be explored. Both the input and the exit process present an opportunity for improvement.

Recommendations to Staff: Staff should continue research on possible reuses for utility poles. Departments should implement a storage plan until beneficial reuses are found. A less contaminated type of pole should also be solicited if it exists and is cost feasible.

6. Should Austin Resource Recovery provide special events services? Leave as is for now; conduct cost of service study to determine changes.

Justification:

- The City maintains a list of vendors and acts only as the service provider of last resort for special events held in the city. Vendor of last resort is an appropriate role for the City. In this role, the City would provide service (using a vendor) only if a special event could not secure a vendor from the list. In this case the City would be paid for the service at Council adopted rates.
- When the City sponsors or co-sponsors a special event, it provides special events services, allowing fees to be waived. Even in these cases, the City contracts with private service providers.
- Waived fees have an impact on ARR rates and city budgets though ARR is an enterprise fund.

Recommendation to Staff: Conduct a service study to determine appropriate reimbursement resort and whether fee waivers regarding waste services for special events are sustainable by relevant departments. This cost of service study can inform budget considerations.

7. Is there a preferred policy for bio-solids management? The Working Group agrees the Dillo Dirt program is important. We recommend retaining it, and adopting the October 2016 **policy recommendations of the WWW/ZWAC Joint Working Group (Exhibit A), with some additional recommendations noted below.**

Justification: Although current procedures generally conform to our Zero Waste goals, the Working Group wants to ensure there is a clear policy in place to provide direction that remains consistent with our goals.

Recommendations to Staff:

- Representative samples of compost will be collected and tested by city staff or an independent third party for stability and maturity;
- Austin Water should develop plans to return to normal operations at the termination
- Per the joint working group recommendation, the working group recommends 100% of biosolids will be converted to compost, while allowing for a diverse range of composts in order to appeal to the widest range of potential markets.

8. Should the City waive the anti-lobbying ordinance (ALO)? No, but revisions are required per recommendations below.

Justification: During working group discussions, both city staff and stakeholders identified a number of ways in which we could clarify and improve the ALO to strengthen working

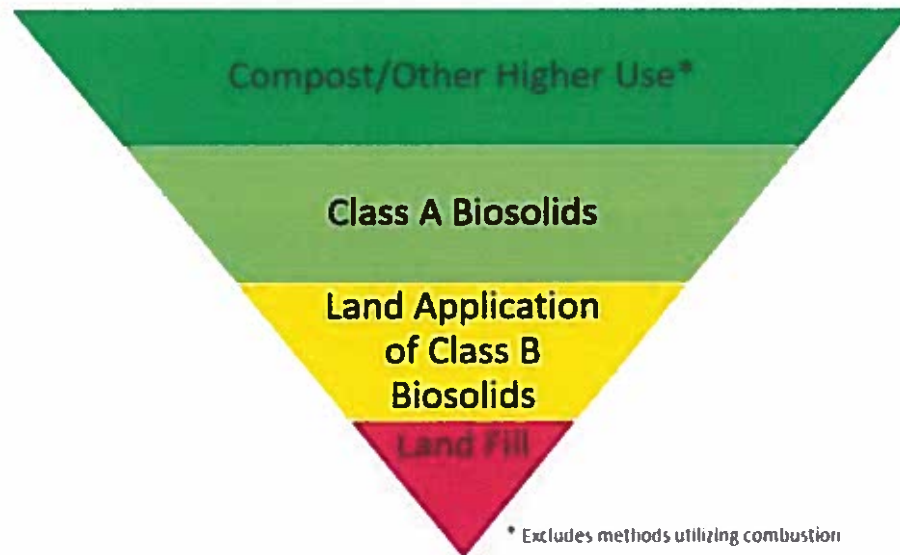
relationships with waste management vendors and the City. Since the ALO applies to all vendors regardless of industry, any changes to with all vendors. In order to reach a healthier and more transparent working climate with all City vendors, the working group recommends the following.

Recommendations to Staff:

- Apply the anti-lobbying ordinance only to the solicitation. Vendors may communicate on all other matters without violating the ALO.
- vote on executing the contract. Should an RFP be pulled down, then the ordinance does not apply during the timeframe the RFP is pulled down
- For instance if staff tells a vendor that the ALO does not apply and a communication is allowable - then the vendor cannot later be disqualified as violating the ordinance by the communication.
- Add communications regarding existing c
- Develop a body of rules in a companion regulatory document to the ALO that defines enforcement, appeal, complaint and debarment procedures.
- The companion document should:
 1. Clarify the current
 2. Clarify procedures for determining violations, judgment, and penalty enforcement and incorporate an option to engage a third-party reviewer such as the Ethics Review Commission to determine violations, judgment, and penalty enforcement.
 3. Clarify the process for submitting and facilitating complaints.
 4. City Purchasing and City Legal should develop this companion document for approval by Council and prepare any language updates to the ALO that might be required to allow for adopted rules in the companion document.
- :
- The existing ALO should remain suspended until Council approves proposed revisions. Staff from Law and Purchasing are working on draft language to address issues identified in discussions with stakeholders. Estimated date for Council approval is the end of September.
- Revisions to the ALO may require continued participation from stakeholders. The Purchasing Office should receive and compile further stakeholder input for Council and will work with adopted input as determined by Council.

**WWW/ZWAC Joint Working Group
Biosolids Management Policy Recommendations**

1. Biosolids management should honor the highest and best use hierarchy. The City will strive to treat all wastewater sludge to Class A designation prior to final distribution.



2. Require production of compost that meets or exceeds United States Compost Council Seal of Test Assurance standards.
3. Plastics shall be predominately removed from all final products.
4. Under emergency conditions, land application of unscreened compost, Class A biosolids, or Class B biosolids may be made on a temporary basis.
 - a. Emergency conditions are defined as severe fire risk, other imminent threats to health and safety, or imminent risk of regulatory non-compliance that could not have reasonably been foreseen.
 - b. If time permits, plastics should still be predominately removed before land application.
 - c. Emergency application of these lower quality products shall extend only as long as necessary to alleviate emergency conditions.
5. Austin Water staff shall inform the City Council via a Corrective Action Memo within five business days of declaration of emergency conditions.

6. Austin Water Operations will be conducted in a manner that will keep odors and pests to a minimum.
7. All products produced using biosolids will be clearly labeled to inform the end user of that fact.
8. The Dillo Dirt trademark name and compost quality will remain in City of Austin control, regardless of who produces the product.
9. Austin Water and Austin Resource Recovery should continue to vet and pilot new technologies and management strategies in line with active policies that will improve biosolids handling.
10. Austin Water and Austin Resource Recovery will continue to communicate with other city departments when contracts are being renewed or solicited to ensure any partnering opportunities are explored.
11. Bulking agents should be limited to by-products of other known activities.

**TEXAS DISPOSAL SYSTEMS 23 URGENT PROPOSED CHANGES TO
CITY STAFF'S REVISED ANTI-LOBBYING ORDINANCE**

October 9, 2017

To avoid infringing on First Amendment free speech rights, ensure administrative objectivity, avoid confusion, and deliver consistency and transparency, TDS proposes the following revisions to the staff's Anti-Lobbying Ordinance (ALO):

NO CONTACT PERIOD

1. To acknowledge that specific communications are permitted, change the name "NO CONTACT PERIOD" to "RESTRICTED CONTACT PERIOD".
2. In recognition of City staff's dual role as waste industry competitor *and* regulator, for all solid waste, recycling and organics management solicitations, initiate the "RESTRICTED CONTACT PERIOD" at the final effective date and time sealed proposal solicitation responses are due and lift the "RESTRICTED CONTACT PERIOD" a minimum of 14 days prior to the date a contract or RCA is considered by the City Council and/or Zero Waste Advisory Commission or any other board or commission.
3. For solicitations unrelated to solid waste, recycling and organics management, clarify that the "RESTRICTED CONTACT PERIOD" begins at the final effective date and time sealed proposal solicitation responses are due, and ends at either initial execution of the resulting contracts or 30 days after Council authorization, whichever is earliest.

PERMITTED REPRESENTATIONS

1. Ensure that the definitions of "PERMITTED REPRESENTATION" and "PROHIBITED REPRESENTATION" are mutually exclusive.
2. Ensure that the definition of "REPRESENTATION" directly excludes communications to the media, community groups and business and advocacy groups.
3. Ensure that the definition of "REPRESENTATION" is specific to direct communications with identified parties, rather than encompassing all communications to all parties.
4. Ensure that the definition of "PROHIBITED REPRESENTATION" is based on the content of the communication itself rather than on the listener's reaction by removing words like "influences" or "persuades."
5. Eliminate all definitions of "PROHIBITED REPRESENTATION" that require subjective analysis, including "advances the interest of the respondent" and "discredits the response of any other respondent."
6. Ensure that the definition of "PERMITTED REPRESENTATION" includes communication related to any existing contract not only between the respondent and the City but also between any person or entity and the City.
7. Clarify that while making a campaign contribution to a City Council member does not constitute a "PROHIBITED REPRESENTATION" in and of itself, any communication associated with making the campaign contribution continues to be subject to ALO restrictions.

DEFINITIONS

1. Clarify that all definitions apply consistently across the ordinance.
2. Narrow the definition of “AGENT” to mean only a person acting at the explicit request of a solicitation respondent in exchange for consideration.
3. Narrow the definition of “RESPONSE” to mean only the contents of a sealed proposal submitted by a bidder in response to a solicitation.
4. Narrow the definition of “RESPONDENT” to a person or entity who submits a “RESPONSE” excluding persons or entities who have withdrawn a “RESPONSE” or been disqualified by the City.
5. ENFORCEMENT / “MITIGATING FACTORS”
6. Establish that the ALO is subject to enforcement by the Ethics Review Commission.
7. Eliminate the proposed authority of the purchasing officer to “consider mitigating factors” in determining violations.
8. As per the original recommendation of the Waste Management Policy Working Group, establish that all administrative rules associated with the ALO must be approved by the City Council before taking effect.
9. As per the original recommendation of the Waste Management Policy Working Group, establish that all staff-determined ALO disqualifications are subject to an appeal process including a protest hearing before the Ethics Review Commission.
10. Establish that all staff-determined ALO disqualifications are subject to a final appeals process including a protest hearing before the City Council.

PENALTY

1. Clarify that a respondent who is disqualified under the ALO may not respond to a subsequent solicitation for the same – rather than a “similar” – project.
2. Clarify that any contract awarded to a respondent later determined to have violated the ALO with respect to the original solicitation can be voided by the City Council, rather than by City staff.
3. RECUSALS
4. Eliminate compulsory recusals of City officials who receive “a representation.” This staff-proposed addition to the ALO not only establishes an overbroad restriction but is also in conflict with existing ethics rules charging City officials, rather than staff, with determining when recusal is required.

ADMINISTRATION

1. Clarify that if the purchasing officer makes any modifications to prohibitions for any solicitation, each solicitation respondent must be promptly notified.

[REDACTED]

From: Meade, Nikelle [REDACTED]
Sent: Friday, October 27, 2017 3:13 PM
To: Einhorn, Peter - BC; Ohueri, J Michael - BC; Kahle, Mary - BC; Holmes, Fredda - BC; Danburg, Debra - BC
Cc: Tom, Cynthia; Smith, Amy; Scarboro, James; Weema, Chris; Palmer, Sue; [REDACTED]; GErwin@[REDACTED]; [REDACTED]; Whellan, Michael; Gay Erwin [REDACTED]; Beth Corbett [REDACTED]; Goodman, Jackie; Sereno, Alba; Craig, Ken
Subject: RE: Meeting of the Ethics and Financial Disclosure Working Group to discuss Anti-Lobbying Ordinance
Attachments: Staff Recommended ALO with TDS Redlines and Husch Blackwell Comments.pdf

Chairman Einhorn and Commissioners,

Thank you for the time you took today to meet with everyone to discuss the ALO. For everyone's use, attached is a PDF of the document I handed out at the meeting. If anyone has questions, please let me know.

Please note that my memo inaccurately notes that TDS and we had reached agreement concerning Note 6, which Mr. Whellan told me this morning is not the case. We have not yet reached agreement on this point.

Nikelle Meade
Partner

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111 Congress Avenue, Suite 1400
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Fax: 512.226.7373

[REDACTED]
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[View Bio](#) | [View VCard](#)

Named a first-tier national real estate law firm by U.S. News-Best Lawyers in 2017

[REDACTED]

[REDACTED]

[REDACTED]

**Comments by Nikelle Meade (Husch
Blackwell LLP) Added in Margins
10.27.17 for Ethics Review
Commission**

**TDS Recommended Revisions Redlined
and Comments in Blue**

RECOMMENDED REVISIONS, 9-28-2017

ARTICLE 6. - ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101- FINDINGS; PURPOSE; APPLICABILITY.

- (A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.
- (B) The council finds that it is in the City's interest:
- (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The council intends that:
- (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) This article applies to all solicitations except:
- (1) City social service funding;
 - (2) City cultural arts funding;
 - (3) federal, state or City block grant funding;
 - (4) the sale or rental of real property;
 - (5) interlocal contracts or agreements; and
 - (6) solicitations specifically exempted from this article by council.
- (E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 2011111052.

§ 2-7-102 - DEFINITIONS.

In this article, for all purposes whenever used:

TDS Comment:

This revision makes it clear that defined terms will be used for interpretation of the Ordinance.

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:

Comment [NM1]: We do not object to this change.

(a) a person acting at the explicit request of respondent in exchange for any type of consideration;

Comment [NM2]: We do not object to the addition of “explicit”, but we do object to “in exchange for any type of consideration”. We understand TDS’s concern that controlling persons who are not hired or paid by a respondent with regard to those persons’ advocacy contacts could be difficult, but we believe the addition of “explicit” (which makes clear that the Respondent is requesting that the contact be made) should apply to any person, whether that person is paid or not. We see no reason or scenario that would necessitate exempting such persons. If a respondent asks someone to advocate on their behalf, such advocacy should be considered lobbying under this ordinance.

It is worth noting that determining whether a person is compensated or not is equally difficult, so adding “in exchange for consideration” does not address TDS’ stated concern.

- ~~(b) a person acting with the knowledge and consent of a respondent;~~
- ~~(c) a person acting with any arrangement, coordination, or direction between the person and the respondent;~~
- (d) ~~(b)~~ a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
- ~~(e)~~ ~~(c)~~ a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and
- ~~(f)~~ ~~(d)~~ a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.

TDS Comment:

This revision narrows the overly broad definition of Agent, which would require staff to determine the nature of relationships and communication among entities without any objective means of doing so. Please see Jim Hemphill's 9/27/2017 Memo on constitutional requirements of speech restrictions as they pertain to staff's proposed ALO revisions (Hemphill Memo).

- (2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).
- (4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).
- (5) **NO CONTACT RESTRICTED COMMUNICATION PERIOD** means the period of time beginning at the final effective date and time a Response to a solicitation is due, ~~as may be extended in the purchasing officer's discretion,~~ and continuing through the earliest of the following:
- ~~(a) the date of the initial execution of the contract resulting from the solicitation is signed (if multiple contracts are executed pursuant to a solicitation, then the date of initial execution of the last contract to be signed);~~
- ~~(b) 60 days following council authorization of the last contract resulting from the solicitation; or~~
- ~~(c) cancellation of the solicitation by the City.~~
- ~~(d) 14 days prior to the date a contract or RCA related to solid waste, recycling or organics is considered for action by the City Council, or~~
- ~~(e) 14 days prior to the date a contract or RCA is considered for recommendation by the Zero Waste Advisory Commission.~~

TDS Comment:

As there is not an actual "No Contact Period" envisioned by the ordinance; for the sake of accuracy this term should be changed to "Restricted Contact Period", as there are a variety of communications that are both permitted and prohibited. Further edits are intended to 1) utilize language that is not subject to variable interpretations, for the sake of creating a clear expectation of the effect of the proposed limits on speech, which is required when limiting speech; 2) more reasonably limits the time respondents will be bound by the ALO in the event that staff choose not to take any action pursuant to a solicitation; and, 3) creates an earlier termination of the Restricted Contact Period specifically for solicitations for solid waste, recycling and organics management related services. This market segment specific provision is necessary due to the staff's unique dual role as both regulator of, and competitor within this market segment, staff's history of ambitious pursuit of greater control over and revenue from this market segment, and staff's demonstrated propensity to embed significant policy implications concerning this market segment within the solicitation process. The ability of respondents to speak freely with policy makers prior to

Comment [NM3]: We do not object to this change so long as "in exchange for any type of consideration" is not added in (a) above.

Comment [NM4]: We do not support this change, as anyone the Respondent "coordinates with, directs, or makes arrangements with to have them advocate on the Respondent's behalf should be covered under these restrictions.

Comment [NM5]: This change seems completely unnecessary, but we do not object to it.

That said, changing this language could cause confusion for people who are not familiar with the process.

Comment [NM6]: We object to both the staff recommendation and TDS's proposed amendments to the staff recommendation. The "No Contact" or "Restricted Communication" period needs to begin the day the RFP is released.

Michael Whellan and I met to discuss, and we came to an agreed compromise that we both find acceptable. This section would be changed as follows:

*Restricted Communication Period will continue to begin on the date the solicitation is published to the public.

*At least 30 calendar days prior to the date a solicitation is published to the public, a Notice of Solicitation shall be released for public comment. The Notice of Solicitation shall, at a minimum, include a statement of the scope of work to be called for in the solicitation and the requirements for participation as a respondent.

Comment [NM7]: We do not object to these changes. Instead, we proposed that (a) simply be amended to add the word, "or contracts" between "contract" and "resulting" in the first line.

Comment [NM8]: We believe this needs to remain 60 days or this Subsection (b) should be removed. Since it is feasible that a contract would take longer than 60 days to negotiate, we see no logic behind opening up lobbying within 60 days.

Additionally, if this Subsection remains, we believe "last contract" should be changed to "contract or contracts".

Comment [NM9]: This proposed addition by TDS and the next one are unnecessary. We believe we and TDS agree to remove these sections if the Notice of Solicitation requirement is added as noted in Comment NM6 above.

finalization of contracts will serve more as deterrent to staff's problematic attempts to create "policy by RFP", rather than an opportunity for respondents to advocate for their solicitation specific interests.

- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.
- (7) RESPONSE means ~~a response to a solicitation; only the contents of the a sealed proposal submitted by an offeror a bidder replying to a solicitation to provide the goods or services solicited by the City.~~

TDS Comment:

This revision simply defines "Response" in the manner that staff's "Comparison Matrix" states that it will be interpreted. However, staff has maintained a problematic circular definition of Response that can be subject to wildly variable interpretations.

- (8) RESPONDENT means a person who ~~makes submits a r~~Response to a City solicitation, even if that person subsequently withdraws its ~~r~~Response ~~or has been disqualified by the City,~~ and includes:
- ~~(a) — a contractor for a respondent;~~
- ~~(b)(a) a subsidiary or parent of a respondent; and~~
- ~~(c) — a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and~~
- ~~(d)(b) a subcontractor to a respondent in connection with that respondent's response.~~

TDS Comment:

These revisions remove unnecessary portions and limit the requirements to things that can be objectively determined by staff. Revisions also eliminate the potential for broad interpretations that would allow the staff to enforce against speech that is not constitutionally eligible for government restriction.

- (9) REPRESENTATION means a communication, ~~whether or not initiated by a respondent or agent,~~ that is:
- (a) related to a response;
- (b) made by a respondent or agent; and
- ~~(c) made directly to a council member, City employee, City representative, or independent contractor hired~~
- ~~(e)(d) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.~~

TDS Comment :

This revision clarifies the limit of speech that is constitutionally allowed to be restricted. Please see the Hemphill Memo for the detailed basis for this revision.

Comment [NM10]: We agree with this change in principal (that any random communication should not be deemed to be a "Response"); however, we believe it needs the following changes:

1. "sealed proposal" needs to be "sealed proposal or bid".
2. "bidder replying to the solicitation" needs to remain "offeror" since not all solicitations call for "bidders".
3. We feel strongly that the phrase "provide the goods or services solicited by the City" must remain intact to address the loophole TDS utilizes to get proposals through without going through the bid process.

Comment [NM11]: We do not believe a Respondent should be exempt from the regulations if that Respondent is disqualified unless the Respondent's appeal opportunity has been fully resolved or has lapsed.

Comment [NM12]: This needs to remain.

Comment [NM13]: This needs to remain.

Comment [NM14]: This language needs to remain. It would not cause any random communication to be prohibited or cause a violation. With Subsection (b), only the respondent's or agent's communication would be covered here.

Comment [NM15]: What would be an "indirect" communication that TDS would want to permit?

Comment [NM16]: Although we agree that "media" should be excluded, it needs to be defined. But, we DO NOT agree that "citizen groups and business/advocacy organizations" should be excluded here. A Respondent should have a responsibility when communicating to these groups to ensure that council members, city employees, city representatives, and city contractors are not included in the communication.

- (10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:
- (a) an invitation for bids;
 - (b) a request for proposals;
 - (c) a request for qualifications;
 - (d) a notice of funding availability; and
 - (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 - PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that: ~~is intended to or reasonably likely to~~

- (1) provides substantive information about the response to which it relates;
- ~~(2) advance the interests of the respondent with respect to the solicitation to which it relates;~~
- ~~(3)(2) discredit the response of any other respondent to the solicitation to which it relates;~~
- ~~(4) [NOTE - an alternative to strikeout may be something like "Permitted representations under Section 2-7-1 04(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3)." This resolves any potential interpretive conflict between those provisions.]~~
- ~~(5)(3) encourages~~ the City to reject all of the responses to the solicitation to which it relates;
- ~~(6)(4) conveys~~ a complaint about the solicitation to which it relates; or
- ~~(7)(5) directly or indirectly ask, influences, or persuades any~~ City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

This revision removes criteria that cannot be objectively determined by the staff, and appropriately tailors the ordinance to the constitutional limits on restriction of speech. Please see the Hemphill Memo for the detailed basis for this revision.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely to an existing contract between a respondent any person or entity~~

Comment [NM17]: We believe this language should remain. Since all parties agree that the review of violations will be elevated to the ERC, the ERC should be able to consider intent and reasonableness. With ERC review, TDS's concern that the city staff will randomly make an invalid claim against them is addressed.

Comment [NM18]: We agree to this alternative language but do not agree to strike Subsections (2) or (3). Section 2 and 3 are the primary point of the ALO. Removing them defeats the point of having an ALO at all.

Comment [NM19]: What would a Respondent do that would "indirectly" influence or persuade?

Comment [NM20]: We do not agree to this change. Only those communications that are solely related to an existing contract should be permitted.

In the alternative, we would agree to an amendment of this section which states something along the lines of "any communication to the extent that **it does not relate to** an existing contract between..."

Comment [NM21]: We do not agree to this change. With the alternative language above, this change is not needed.

and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

TDS Comment:

This revision removes a content based restriction on speech that is presumptively unconstitutional. Please see the Hemphill Memo for further detail.

- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) ~~any communication occurring when~~ making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

Comment [NM22]: We agree with this change.

TDS Comment:

Contrary to statement of staff, this is not simply a concept carried forward from the previous version of the ordinance, staff's language would actually lift all ALO restrictions, under the condition that otherwise prohibited statements would be accompanied by a monetary donation to a campaign, while existing (and TDS proposed) language simply make clear that a campaign donation is not a restricted communication. Staff's language could not be more counter to the stated intent of the ordinance.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 - MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. ~~The purchasing officer must promptly transmit any such written waiver, modification, or reduction to all respondents.~~

Comment [NM23]: We agree with this change.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 - ENFORCEMENT.

- (A) ~~This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.~~
- (B) ~~The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.~~
- (C)(A) The purchasing officer has the authority to enforce this article through Council approved rules ~~promulgated in accordance with Section 1-2-4~~, which at a minimum shall include a notice, and protest hearing and appeal process for respondents disqualified pursuant to Section 2-7-107, including:
- (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to ~~protest the penalty imposed a hearing before, and determination by, the Ethics Review Commission~~; and
 - (3) written notice of the right to ~~request a an impartial hearing process~~ a final appeal before the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

The TDS proposed revisions to the Enforcement section are intended to accomplish 1) Removal of the arbitrary exclusion of the Ethics Review Commission from any oversight role in the Ordinance; 2) Removal of the problematic language providing the purchasing officer the authority to determine when/if violations should be ignored for whatever reason staff sees fit; 3) Establish that administrative rules must be approved by Council as recommended by the Council Waste Management Policy Working Group; 4) allow for a protest hearing before, and decision by the Ethics Review Commission as recommended by the Council Waste Management Policy Working Group; and, 5) allow for a final appeal before City Council. Without these changes to the enforcement section of the ALO, the staff would have absolute authority to establish rules, interpret and enforce the ordinance without any oversight of any kind from elected officials or their appointees. Given staff's dismal record of fairly interpreting and enforcing the ALO, these changes are imperative.

§ 2-7-107 – PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same ~~or similar~~ project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same ~~or similar~~ project".
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City Council.

Comment [NM24]: We agree with this change.

Comment [NM25]: We do not agree to this change. We believe the process should be that the purchasing officer enforces the provisions but they are subject to appeal by the ERC. As such, this section should be amended to make clear that the ERC (if the matter is appealed to them) can also consider these factors.

We also believe that this section should include the following:

1. Prescribed time period within which one can appeal;
2. Prescribed ERC review and decision deadlines; and
3. A stay of the solicitation process until the appeal is resolved by the ERC.

Comment [NM26]: We have no strong objection to this change but – at the same time – do not see any real need for it.

Comment [NM27]: We do not object to this change.

Comment [NM28]: We disagree wholeheartedly with this change. The appeal process does not need three levels of review. ERC is fully capable of making the final call.

Comment [NM29]: We agree that "or similar" is vague. However, we think some restriction needs to be retained here. We suggest that "or similar" be changed to be "same project or a project with a substantially similar scope of work".

Comment [NM30]: We agree with this change.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

TDS proposed revisions to the "Penalty" section are necessary eliminate opportunities for interpretations that go beyond the intent of the ALO, and to create a clear expectation of the results of a violation. Without the revisions to the "same or similar project" language, the staff effectively maintains the ability to permanently debar a vendor, as they would have the ability to determine that any solicitation within a particular market segment is a "similar project" to a solicitation that was the subject of a disqualification. Also, without the inclusion of the term "Council" at the end of 2-7-107(0), the staff would have the authority to unilaterally subvert the will of the Council, based simply on a retroactive allegation of prohibited communication, without substantiation. If there is a need to void a contract due to violations of the ALO, then the Council should make that decision.

§ 2-7-108 - RECUSAL.

- ~~(A) During a no contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~
- ~~(B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~
- ~~(C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

TDS Comment:

Staff's newly proposed "Recusal" section amounts to an unprecedented transfer of authority from the Council to staff and should be rejected outright. Under this provision, along with others proposed by staff, staff would be empowered to impose compulsory recusal on any Council Member or B&C Member by simply claiming they spoke to a respondent, or failed to report contact between a respondent and any other City employee or official, whether or not the subject of that communication was prohibited, and regardless of whether or not staff determines that a violation of the ALO has taken place. This would give the staff the ability to remove individual votes they may deem unfriendly to their stated or unstated agendas, without any requirement to carry out the remaining supposed requirements of the ordinance. Council Members and their appointees on B&C's should have the sole authority to determine whether they ought to be recused from taking action based on existing code of ethics requirements, and not be subject to the staff unilateral declaration of recusal, without any requirement to substantiate their basis for doing so.

Additions:

1. Debarment must be brought back in.
2. Any organization or entity that lobbies in connection with a solicitation should be required to disclose to the City any annual monetary or in-kind contribution in the amount \$50,000.00 made to the organization or entity during the prior two year period by any Respondent in that solicitation. The disclosure must be written, must be filed with the City Clerk, and must be submitted within 2 business days of the date such contact occurs.

Comment [NM31]: We do not agree with this change. Council members, staff, etc., should not contact Respondents outside of the formal procurement process since it is critical that these processes proceed with transparency and with all Respondents having the same information.

TDS's claim that this section transfer Council authority to city staff is invalid since the ultimate enforcing authority is being changed to the ERC.

Comment [NM32]: We see no reason for this change.

Comment [NM33]: We do not agree with this change.

Palmer, Sue

From: Andrew Dobbs [REDACTED]
Sent: Friday, October 27, 2017 5:32 PM
To: Meade, Nikelle; Einhorn, Peter - BC; Ohueri, J Michael - BC; Kahle, Mary - BC; Holmes, Fredda - BC; Danburg, Debra - BC
Cc: Tom, Cynthia; Smith, Amy; Scarboro, James; Weema, Chris; Palmer, Sue; [REDACTED]; 'Whellan, Michael'; 'Gay Erwin [REDACTED]'; 'Beth Corbett [REDACTED]'; Goodman, Jackie; Sereno, Alba; Craig, Ken
Subject: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

October 27, 2017

Commissioners:

As promised, here is my analysis of where the positions of the various parties are with reference to the ZWAC recommendations laid out on October 11. In this analysis I am suggesting some possible compromises that may bring us closer to a resolution to this important and challenging issue. These do not, of course, reflect the input of parties that have not yet weighed in, but should help clarify where things stand prior to their engagement.

Areas of Consensus or Near Consensus

Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.

There is consensus that some sort of appeal to an authority outside of the Purchasing Department is advisable. Ms. Meade has objected to allowing an appeal to Council, and you all indicated a wariness to make ERC the body to consider the appeals. TCE does support allowing an appeal to Council, but more fundamentally we believe that some sort of appeal to a non-staff body is the key point here. We are okay with some other appointed body serving this role as opposed to the ERC, but we oppose any process that will keep the power to review in the hands of staff only.

Clarification that only Council may void a contract for violation for the ALO.

This is an area of flat consensus between the parties that have presented their positions to date.

Replace disqualification for “similar” projects with a disqualification for the SAME project.

This is an area of near consensus, with the concept apparently acceptable to all even if the mechanisms for doing so in the code being disputed. Ms. Meade proposed language to the effect of “same project or a project with a substantially similar scope of work.” While some of these terms are open to interpretation an independent appeals process should minimize the risk of abuse.

Areas Not Addressed or of Ambiguous Status

A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.

This is not addressed in either Mr. Whellan's or Ms. Meade's documents. That said, no sides have to date objected to the idea that administrative rules should be subject to public approval, and we urge you to include this recommendation so that we avoid confusion and unnecessary conflicts in the future.

Definition of the term "response."

TDS' proposed changes to the definition proposed by staff were substantially agreed to by Ms. Meade with the insistence that the phrase "provide the goods or services solicited by the City" be kept in place. We hope that this will be acceptable to all parties, and with other protections introduced so far this suggestion from ZWAC may not be as significant as it would be under the present ALO, where this ambiguity has been abused in the past.

Assurance that the ordinance will not consider public communications to be in any way a violation.

This is a topic that has been addressed and agreed to in some ways, disagreed to in others, and unaddressed in yet others. All sides agree that statements to the media should be exempted from the ALO. As for protections that explicitly protect communications at public commission or Council meetings, this is still absent from the proposed document and nobody has expressed any objections to this so far. Finally, Ms. Meade objected to the inclusion of "business groups or advocacy groups" in permitted communications.

Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.

All sides agree that organizations without any relationships to respondents are free to advocate. Ms. Meade both wants disclosure for any entities that receive contributions from respondents and opposes any explicit carve outs for this sort of behavior. We support an explicit guarantee of the right of non-profit groups to advocate on contracts. Although non-profit groups by federal law do not have to reveal their funding sources, a limited disclosure of relationships could be workable.

Clarification of subjective terms such as "influences," "persuades," "advance the interests," or "discredit." At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.

This has not been specifically addressed by the sides weighing in thus far. Ms. Meade did object to striking the term "indirectly" in sections using some of these terms, but expressed no problems with eliminating "influences" and "persuades." She appears to have no objection to striking "advance the interests" and "discredit," though she may also be suggesting that these could be the call of the appellate body for the ordinance. We recommend striking these subjective terms for the sake of strict clarity in the ordinance.

Areas of Remaining Disagreement

Eliminate or delineate the power of purchasing officers to determine "mitigating factors" in violations.

Ms. Meade says that they object to striking this provision, but then goes on to say that ERC (or, presumably, any entity appealed to) should have the ability to consider these factors. It strikes us as inappropriate for staff to unilaterally determine that a violation should NOT be considered because of undefined "mitigating factors," since this non-decision cannot be appealed as far as we can tell. It may make sense to empower ERC to consider such factors, but even this may be problematic. With the revisions at hand the ordinance is essentially unambiguous, and those that violate its simple standards should not be subjectively granted passes to disregard City rules.

Striking all sections which empower staff to require recusal of elected or appointed City officials.

This is an area of substantial and significant disagreement. It seems appropriate to us to include somewhere in the ordinance an explicit prohibition on staff and other officials from contacting respondents (to supplement the existing prohibition on communications in the other direction--respondents contacting staff or Council), as well as some mechanism for recording such incidents if they do occur. What is totally inappropriate is any power given to City staff to direct elected officials or their appointments to compel recusal. It is likewise not appropriate for appointed officials to be able to compel elected officials in this way.

Some sort of authorization to publicly recommend recusal may be appropriate with elected and appointed officials able to determine whether they will comply with or reject this recommendation. But an imbalance between the powers of staff and Council is what brought us to this point; we need to prevent a new path for the same mistake.

Previously Addressed Areas Now Contested

Debarment as a Penalty

Staff's present draft revisions to the ordinance and their policy proposals earlier in the Council Working Group process had eliminated debarment as a possible penalty. There are a number of cities that rely only upon disqualification only as a penalty and do not provide for debarment. We see no reason to go back on this topic.

Beginning and Ending Points for the Restricted/No Contact Period

Staff's draft of the ALO revisions began the Restricted Contact Period after the close of the solicitation and ends it with either the cancellation of the process, the successful execution of the contract or sixty days after Council authorization to negotiate with the selected vendor. We believe that this starting point is the most appropriate, as it allows for advocacy in the instance that a proposed contract reflects bad policy or staff departure from policy. If the process begins when the solicitation opens it forces potential vendors to either go along with bad policy or to surrender their rights to bid. These are the very companies we want bidding the most, and the policy design being proposed now makes that the most likely.

As for the ending point, we see a great deal of benefit in allowing some advocacy in the period between the vendor being chosen and before it is finally decided upon by Council. Again, if the chosen contract departs from policy or reflects a bad expression of existing policy the people most likely to spot this may be firms involved in that industry and their voices could be of great benefit for the public interest.

As for the concept of a "Notice of Solicitation" before the solicitation is issued, this is better than status quo for sure, but there have been numerous concrete instances of solicitations changing between their initial design and their final issuance. Mr. Scarboro himself acknowledged the "iterative" nature of this process, so this notice seems insufficient to accomplish the goals suggested above.

Recommended Recommendation

If you wanted to make a recommendation to Council that reflects the areas of consensus or non-objection to this point you could say something to the effect of:

"The Ethics Review Commission recommends that the Austin City Council adopt proposed changes to the Anti-Lobbying Ordinance (ALO) with the following amendments:

- A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.
- A guaranteed appeals process for all penalized violations to a board appointed by the Council.
- Clarification that only Council may void a contract for violation for the ALO.
- Clarification that disqualification only applies to solicitations for the same project or a project with a substantially similar scope of work."

If you wanted to include our suggested recommendations for the areas of ambiguity, you could add:

- Amendment of the definition of “Response” to read “only the contents of a sealed proposal or bid submitted by an offeror replying to a solicitation to provide the goods or services solicited by the City.”
- Exemption for communications made in public meetings or to the media.
- Exemption for independent advocacy from non-respondents from being used to disqualify respondents.
- Elimination of subjective terms such as “influences,” “persuades,” “advance the interests,” or “discredit.”

Our suggestions for the areas that have not been agreed to yet or that remain areas of contention would be:

- Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.
- Striking all sections which empower staff to require recusal of elected or appointed City officials.
- Ending the Restricted Contact Period at some point before Council has voted to authorize the contract under consideration.

We do not at this time recommend any other specific recommendations.

Thank you again for your service on this important commission and your work so far. We look forward to the outcome of this difficult process, and are happy to answer any questions you may have on this or other topics.

Sincerely Yours,

Andrew Dobbs
Central Texas Program Director
Legislative Director
Texas Campaign for the Environment
(512) 326-5655
www.texasenvironment.org www.facebook.com/texasenvironment

[REDACTED]

From: Bob Gregory [REDACTED]
Sent: Monday, October 30, 2017 11:38 AM
To: [REDACTED]; Einhorn, Peter - BC <bc-Peter.Einhorn@austintexas.gov>; Ohueri, J Michael - BC <bc-Jmichael.Ohueri@austintexas.gov>; Holmes, Fredda - BC <BC-Fredda.Holmes@austintexas.gov>; Kahle, Mary - BC <BC-Mary.Kahle@austintexas.gov>; Danburg, Debra - BC <BC-Debra.Danburg@austintexas.gov>; Tom, Cynthia <cynthia.tom@austintexas.gov>; Smith, Amy <Amy.Smith@austintexas.gov>; Scarboro, James <James.Scarboro@austintexas.gov>; [REDACTED]; [REDACTED]; Goodman, Jackie <Jackie.Goodman@austintexas.gov>; Sereno, Alba <Alba.Sereno@austintexas.gov>; Craig, Ken <Ken.Craig@austintexas.gov>; [REDACTED]
Cc: Stratmann, Robert - BC <bc-Robert.Stratmann@austintexas.gov>; Harding, Meagan - BC <bc-Meagan.Harding@austintexas.gov>; McCormick, Donna Beth - BC <bc-DonnaBeth.McCormick@austintexas.gov>; Soberon, Luis - BC <BC-Luis.Soberon@austintexas.gov>; Speight, Dennis - BC <bc-Dennis.Speight@austintexas.gov>; Thompson, Brian - BC <bc-Brian.Thompson@austintexas.gov>; [REDACTED]; [REDACTED]; Mark Nathan [REDACTED]; Gary Newton [REDACTED]; Ryan Hobbs [REDACTED]; Adam Gregory [REDACTED]
Subject: TDS Response to Andrew Dobbs' 10-27-17 Email

Ethics Review Commission Commissioners and stakeholders:

Given the unique role of Texas Campaign for the Environment (TCE) as the only non-industry stakeholder currently engaged in the ERC review of proposed revisions to the Anti-Lobbying Ordinance (ALO), I'm writing in response to [Mr. Dobbs' 10/27/17 email](#) forwarded to me by Michael Whellan, linked and also attached, to briefly detail where Texas Disposal Systems (TDS) agrees and mildly differs with TCE's stated positions. I am sending this response to everyone on Mr. Dobbs' email for which I have an address. TDS values TCE's long history of advocacy on behalf of the environment and a transparent public process and would propose that the ERC consider utilizing TCE's stated positions on key ALO issues as the basis for an analysis matrix indicating where industry stakeholders may agree or disagree.

In addition, TDS would also request ERC's specific attention to the unanimous [10-11-17 recommendations of the Zero Waste Advisory Commission](#) (ZWAC) (also attached) with regard to ALO revisions. Also, please note that the Council recognized a need to review waste services policy issues, including concerns related to the current ALO, and that the initial proposal to revise the ALO originated with a recommendation from the Waste Management Policy Working Group. Not only did the City Council vote on [9-28-17](#) to request that the ERC review the proposed ALO revisions, but in voting on 3-23-17 (see [transcript](#) and [resolution](#)) to create the Waste Management Policy Working Group also specifically requested that each of the Working Group [recommendations](#) be reviewed by ZWAC prior to presentation to Council. Accordingly TDS would urge that ZWAC's stated positions on ALO revisions also be reflected in any matrix employed by the ERC to analyze the positions of industry stakeholders and develop final recommendations. Please note

that the 10/27/17 TCE positions from Mr. Dobbs are consistent with the [10/11/17 recommendations](#) made by ZWAC and the ZWAC recommendations of [7/12/17](#) and [8/9/17](#).

KEY ALO ISSUES

APPEAL: TDS *agrees* with TCE's position in favor of a right to appeal "all ALO disqualifications and other penalties or determinations" to a non-staff body and to the City Council.

While TDS does not object to TCE's proposal to create a Council-appointed board to hear ALO appeals if the ERC prefers to not be that entity, TDS continues to support allowing ALO appeals to both the ERC and the City Council. ZWAC's recommendation ([second bullet point in the ZWAC 10/11/17 recommendations](#)) also supports appeal to both the ERC and City Council.

VOIDING CONTRACTS: TDS *agrees* with TCE's position establishing that only Council may void a contract for violation of the ALO.

ZWAC's recommendation (third bullet point) also supports TCE's position.

SIMILAR PROJECTS: TDS *agrees* with TCE's position in favor of replacing disqualification for "similar" projects with a disqualification for the "same" project.

ZWAC's recommendation (tenth bullet point) also supports TCE's position of replacing "similar" with "same".

RULEMAKING: TDS *agrees* with TCE's position in favor of public participation in the ALO administrative rulemaking process, including final review and approval of administrative rules by the ERC and City Council.

ZWAC's recommendation (first bullet point) also supports TCE's position.

DEFINE RESPONSE: TDS *agrees* with TCE's position in favor of defining the term "response" as "only the contents of a sealed proposal or bid submitted by an offeror replying to a solicitation to provide the goods or services solicited by the City."

ZWAC's recommendation (seventh bullet point) also supports TCE's position, but without offering a specific proposed definition.

PUBLIC COMMUNICATION: TDS *agrees* with TCE's position in favor of assurance that the ALO will not consider public communications to be in any way a violation.

ZWAC's recommendation (fifth bullet point) also supports TCE's position.

INDEPENDENT ADVOCACY: TDS *agrees* with TCE's position in favor of assurance that independent advocacy from non-respondents will not be used to disqualify respondents. TDS believes First Amendment case law effectively prohibits what Synagro's attorney advocates.

ZWAC's recommendation (sixth bullet point) also supports TCE's position.

SUBJECTIVE TERMS: TDS *agrees* with TCE's position in favor of striking the subjective terms "influences," "persuades," "advances the interests," and "discredits." TCE's position appears to be more specific than ZWAC's position, which recommends Council give direction to staff to provide objective standards for these terms.

TDS supports TCE's position in favor of striking these subjective terms for the sake of strict clarity in the Ordinance. TDS' strong preference is for the *elimination* of all subjective terms from the ALO. ZWAC's recommendation (eighth bullet

point) supports TCE's position, but with some flexibility for Council to direct staff to provide objective standards for these terms as part of their rulemaking.

MITIGATING FACTORS: TDS *agrees* with TCE's position in favor of eliminating or delineating the power of purchasing officers to determine "mitigating factors" in violations.

While TDS supports TCE's comments and position, TDS' strong preference is for the complete *elimination* of the staff proposed authority of purchasing officers to consider "mitigating factors" in determining ALO violations. Staff requested Council to remove the ALO restriction from the 2016 Biosolids Management solicitation so they would not have to determine whether Synagro had violated the ALO restrictions applied to that withdrawn solicitation. ZWAC's recommendation (ninth bullet point) supports TCE's position.

RECUSALS: TDS *agrees* with TCE's position in favor of striking all sections that empower staff to require recusal of elected or appointed City officials.

ZWAC's recommendation (fourth bullet point) also supports TCE's position.

DEBARMENT AS A PENALTY: TDS *agrees* with the TCE position and understanding that debarment should be and will be eliminated as a possible penalty.

ZWAC recommendation (third bullet point) apparently deals with this by recommending that "only Council may void a contract for violation for the ALO."

RESTRICTED CONTACT PERIOD: While TDS proposes that there should be no ALO restrictions applied to waste services solicitations, TDS *agrees* with TCE's position in favor of beginning the restricted contact period after the close of the solicitation (after the sealed proposals, bids or RFP responses are submitted) and lifting the restricted contact period at some point between the time staff chooses a respondent to recommend and before it is finally decided upon by Council. However, TDS also recommends ALO restrictions be lifted before consideration of proposed contracts by Boards and Commissions and with sufficient time to review and respond to the posted proposed contract.

As noted, TDS agrees with TCE's position in favor of beginning the restricted contact period when solicitations are due; TDS also very strongly endorses TCE's suggestion of "a great deal of benefit in allowing some advocacy in the period between the vendor being chosen and before it is finally decided upon by Council" and likewise TCE's indication that "if the chosen contract departs from policy or reflects a bad expression of existing policy the people most likely to spot this may be firms involved in that industry and their voices could be of great benefit for the public interest." While TDS is not aware that TCE has proposed a specific timeframe for lifting the restricted ALO contact period prior to consideration of proposed contracts, TDS again strongly urges the ERC to support lifting the restricted contact period no later than 14 days before each proposed contract is posted for consideration by EITHER a citizen board or commission or the City Council. However, if the ERC ultimately chooses NOT to recommend lifting the restricted period before consideration of proposed contracts, TDS would then *strongly* urge the ERC to specifically recommend that City staff present all negotiated contract documents to boards and commissions and the City Council prior to requesting a recommendation for contract approval – a recommendation that has been adopted unanimously, *twice* by ZWAC (also attached). To *neither* lift the restricted contact period prior to consideration of proposed contracts *or* to require staff presentation of all negotiated contract documents prior to requesting a recommendation would constitute a wholesale abandonment of the appropriate oversight role of public stakeholders and City officials vis-à-vis the City's contracting process.

Finally, TDS would call ERC's attention to ZWAC's important recommendation to Council to "Continue to keep the Anti-Lobbying Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council." See ZWAC's recommendation (eleventh bullet point). Please recall that the [City Council voted on 4-6-17 to temporarily waive the application of the ALO to all City waste solicitations](#) (see attached [Ordinance No. 20170406-023 and its Exhibit A](#)) in order to allow stakeholders and City officials to "openly exchange information on Solid Waste policy issues" and "until Council has given staff direction on the policies applicable to such

matters.” As at least one Council member appears to be contemplating reapplication of an amended version of the current ALO to a pending waste solicitation, TDS would urge the ERC to please consider adopting the same recommendation as ZWAC in order to clearly establish the importance of allowing the ongoing policy review process – both with regard to the ALO and the other waste-related policy issues still pending before ZWAC, other Boards and Commissions and the City Council – to continue without impediment.

Thank you for your ongoing efforts and please do not hesitate to contact me directly with any questions or concerns. For your reference, here is a [link to our 10-6-17 email](#) to ERC commissioners detailing TDS’ full position on ALO revisions.

Sincerely,
Bob Gregory
President & CEO
Texas Disposal Systems
512-619-9127



ZERO WASTE ADVISORY COMMISSION RECOMMENDATION 20171011-003b

Date: October 11, 2017

Subject: **Recommendation from ZWAC Regarding City Code Chapter 2-7, Article 6 relating to anti-lobbying and procurement.**

Motioned By: Commissioner Blaine

Seconded By: Commissioner Bones

Recommendation

At the October 11, 2017 meeting of the Zero Waste Advisory Commission, the Commission made the following recommendation regarding the Anti-Lobbying Ordinance (ALO).

Description of Recommendation to Council

The Zero Waste Advisory Commission registers a serious concern that the recommendations of the Waste Management Policy Working Group are not well reflected in the drafted changes to the Anti-Lobbying Ordinance (ALO) and recommends adoption of the changes to the ALO detailed below:

- A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.
- Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.
- Clarification that only Council may void a contract for violation for the ALO.
- Striking all sections which empower staff to require recusal of elected or appointed City officials.
- Assurance that the ordinance will not consider public communications to be in any way a violation.
- Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.
- Definition of the term “response.”
- Clarification of subjective terms such as “influences,” “persuades,” “advances the interests,” or “discredits.” At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.
- Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.
- Replace disqualification for “similar” projects with a disqualification for the SAME project.”
- Continue to keep the Anti-lobby Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council.

Vote: 8-0-0-2

For: Commissioners Acuna, Blaine, Bones, de Orive, Hoffman, Masino, Rojo, White,

Against: 0 Abstain: 0 Absent: Joyce, Gattuso

Attest:

A handwritten signature in cursive script, appearing to read "Michael Sullivan".

Michael Sullivan, ZWAC staff liaison



BOARD/COMMISSION RECOMMENDATION

Zero Waste Advisory Commission

Recommendation Number: (20170712-003a): Solicitation Review Process

WHEREAS, it is the Responsibility of the Zero Waste Advisory Commission (ZWAC) to review, evaluate and make recommendations to the City Council and the City staff regarding City policies concerning solid waste, recycling, organics management and Zero Waste; and

WHEREAS, implementation and/or adherence to City policies must be reflected in the process of soliciting for and procuring goods and services; and

WHEREAS, the ZWAC desires the opportunity to effectively review, evaluate and make recommendations concerning solicitations for goods and services, and the contracts derived from those solicitations; and

WHEREAS, the ZWAC cannot effectively ensure adherence to City policy or make recommendations regarding the proper interpretation and application of City policy without the opportunity to review proposed solicitation documents prior to their issuance, and proposed contract documents prior to a request for approval.

NOW, THEREFORE, BE IT RESOLVED that the Zero Waste Advisory Commission of the City Of Austin requests that staff present to the ZWAC the “Scope of Work” and the “Scoring Criteria” for proposed solicitations prior to the official issuance of any solicitation related to solid waste, recycling, organics management and/or Zero Waste.

BE IT FURTHER RESOLVED that the ZWAC requests the staff to present negotiated contract documents to the ZWAC prior to requesting a recommendation for approval of a contract related to solid waste, recycling, organics management and/or Zero Waste.

BE IT FURTHER RESOLVED that the ZWAC asks the City Council to provide directive to ARR staff to comply with this recommendation in an effort to facilitate sound and consistent policy throughout.

Date of Approval: July 12, 2017 **Vote: 8-0-0-2**

For: Commissioners Acuna, Masino, Gattuso, Rojo, Hoffman, Blaine, Bones, de Orive

Against: 0 Abstained: 0 Absent: Commissioners White, Joyce

Attest:

Michael Sullivan, ZWAC staff liaison



BOARD/COMMISSION RECOMMENDATION

Zero Waste Advisory Commission

Recommendation Number: (20170809-003a): Solicitation Review Process

WHEREAS, it is the Responsibility of the Zero Waste Advisory Commission (ZWAC) to review, evaluate and make recommendations to the City Council and the City staff regarding City policies concerning solid waste, recycling, organics management and Zero Waste; and

WHEREAS, implementation and/or adherence to City policies must be reflected in the process of soliciting for and procuring goods and services; and

WHEREAS, the ZWAC desires the opportunity to effectively review, evaluate and make recommendations concerning solicitations for goods and services, and the contracts derived from those solicitations; and

WHEREAS, the ZWAC cannot effectively ensure adherence to City policy or make recommendations regarding the proper interpretation and application of City policy without the opportunity to review proposed solicitation documents prior to their issuance, and proposed contract documents prior to a request for approval.

NOW, THEREFORE, BE IT RESOLVED that the Zero Waste Advisory Commission of the City Of Austin requests that staff present to the ZWAC the “Scope of Work” and the “Scoring Criteria” for proposed solicitations prior to the official issuance of any solicitation related to solid waste, recycling, organics management and/or Zero Waste.

BE IT FURTHER RESOLVED that the ZWAC requests the staff to present negotiated contract documents to the ZWAC prior to requesting a recommendation for approval of a contract related to solid waste, recycling, organics management and/or Zero Waste.

BE IT FURTHER RESOLVED that the ZWAC asks the City Council to provide directive to ARR staff to comply with this recommendation in an effort to facilitate sound and consistent policy throughout.

Date of Approval: August 9, 2017 **Vote: 9-0-0-1**

For: Commissioners Acuna, Masino, Gattuso, Rojo, White, Blaine, Bones, de Orive, Joyce

Against: 0 Abstained: 0 Absent: Commissioner Hoffman

Attest:

Michael Sullivan, ZWAC staff liaison

ORDINANCE NO. 20170406-023

AN ORDINANCE WAIVING CHAPTER 2-7, ARTICLE 6 (ANTI-LOBBYING AND PROCUREMENT) OF THE CITY CODE REGARDING SOLICITATIONS FOR THE COLLECTION, PROCESSING, RESALE, REUSE AND/OR DISPOSAL OF MUNICIPAL SOLID WASTE, REFUSE, BIOSOLIDS, COMPOST, ORGANICS, SPECIAL WASTE AND RECYCLABLES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. FINDINGS. The City Council adopts the following findings:

The Purchasing Office issues solicitations for a variety of municipal solid waste and waste related services, including but not limited to the collection, processing, resale, reuse and/or disposal of municipal solid waste, refuse, biosolids, compost, organics, recyclables and special waste such as Class 2 industrial non-hazardous waste (collectively referred to as "Solid Waste"); and

1. Chapter 2-7, Article 6 (Anti-Lobbying and Procurement) ("Anti-Lobbying Ordinance") restricts respondents to a solicitation from making certain representations to City staff and officials while a solicitation is active and such restrictions extend for a period of ninety days when a solicitation has been withdrawn or all responses rejected with the intention of reissuing the request for proposals (the "No-Contact Period"); and
2. Council clearly stated on the record at their March 2, 2017 regular meeting that there is no intention to reissue Solid Waste solicitations until such time as the policy issues are vetted; however, in order to avoid any confusion of the application of the Anti-Lobbying Ordinance and to encourage open dialogue while developing City policy on these matters, Council finds it is in the public's best interest to waive the Anti-Lobbying Ordinance for the solicitations specified by Council and expand the waiver to future solicitations related to Solid Waste; and
3. By waiving the Anti-Lobbying Ordinance, stakeholders and City staff will be able to openly exchange information and data on Solid Waste policy issues without the requirement of funneling all information through the authorized contact person for

the solicitations still subject to the Anti-Lobbying Ordinance or wait for the ninety day No-Contact Period to expire; and

4. Council has denied award of the solicitation related to citywide refuse, recycling, organics and special waste collections for City facilities (SLW0514), and postponed indefinitely the solicitation related to organics processing services (SLW0509REBID); and
5. The City Council took action on the following requests for proposals and on October 20, 2016, postponed indefinitely the sale and removal of compost materials solicitation (JXP0501), and withdrew the management of biosolids reuse (CDL2003) solicitation on December 15, 2016; and
6. As no new solicitations have been issued for the same or similar services for the request for proposals described in Section 6 above, and ninety days has passed since Council action, the No-Contact Period and the Anti-Lobbying Ordinance is no longer applicable to the request for proposals and respondents as listed in Exhibit "A;" and, further, the City has not received any anti-lobbying complaints on these two solicitations since Council's action on the items; and
7. On March 23, 2017, City Council created a working group to address a broad range of Solid Waste issues, as well as other issues related to solid waste policy and contracts as it deems necessary; and
8. The working group is scheduled to return to the full City Council with recommendations no later than June 1, 2017; and
9. Council finds this action does not create a precedent or bind the Council to waive the Anti-Lobbying Ordinance for future solicitations not otherwise described in this ordinance and each case is reviewed separately on its own merits and in the Council's sole discretion.

PART 2. Waiver of Chapter 2-7, Article 6. City Council waives the requirements and application of Chapter 2-7, Article 6 (Anti-Lobbying and Procurement) of the City Code to the following: (1) solicitations related to citywide refuse, recycling, organics and special waste collections for City facilities (SLW0514) and organics processing services (SLW0509REBID), and to the respondents to the solicitations shown in the attached Exhibit A, incorporated by reference; and (2) future solicitations, including request for

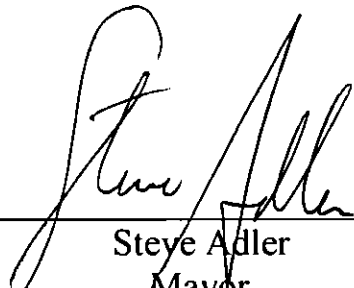
proposals and invitations for bid related to the collection, processing, use, resale and/or disposal of municipal solid waste, refuse, biosolids, compost, organics, recyclables and special waste such as Class 2 industrial non-hazardous waste, excluding solicitations and contracts related to consulting, marketing and outreach of same, until Council has given staff direction on the policies applicable to such matters.

PART 3. Council finds that the waiver presented in this ordinance constitutes an emergency. Because of this emergency, this ordinance takes effect immediately on its passage for the immediate preservation of the public peace, health, and safety.

PASSED AND APPROVED


_____, April 6, 2017

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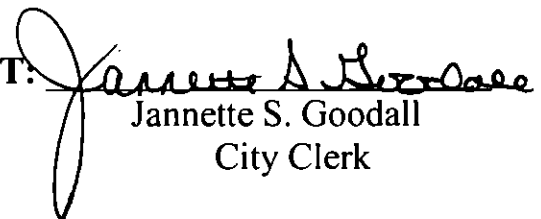
Steve Adler
Mayor

APPROVED:



Anne L. Morgan
City Attorney

ATTEST:



Jannette S. Goodall
City Clerk

EXHIBIT A

Respondents to the following Request for Proposals:

A. Waiver of Anti-Lobbying Ordinance:

1. Citywide refuse, recycling, organics and special waste collections for City facilities (SLW0514):
 - a. Republic Services
 - b. Waste Management of Texas
2. Organics processing services (SLW0509REBID):

Employee Owned Nursery Enterprises, LTD dba Organics “By Gosh”

B. Expired No-Contact Period of the Anti-Lobbying Ordinance:

1. Sale and removal of compost materials solicitation (JXP0501):
 - a. Allen Click
 - b. Organics By Gosh
2. Management of biosolids reuse (CDL2003):
 - a. Synagro of Texas-CDR, Inc.
 - b. Denali Water Solutions
 - c. Forsythe Brothers Infrastructure, LLC
 - d. Texas Elements Inc.
 - e. Allen Click

[REDACTED]

From: Whellan, Michael [REDACTED]
Sent: Monday, October 30, 2017 7:04 PM
To: Tom, Cynthia <cynthia.tom@austintexas.gov>; Smith, Amy <Amy.Smith@austintexas.gov>; Scarboro, James <James.Scarboro@austintexas.gov>; Weema, Chris <Chris.Weema@austintexas.gov>; Palmer, Sue <Sue.Palmer@austintexas.gov>; [REDACTED]; [REDACTED]; [REDACTED]; Goodman, Jackie <Jackie.Goodman@austintexas.gov>; Sereno, Alba <Alba.Sereno@austintexas.gov>; Craig, Ken <Ken.Craig@austintexas.gov>; Hemphill, Jim [REDACTED]; Meade, Nikelle [REDACTED]; Jed Buie [REDACTED]; [REDACTED]; Sara Koeninger [REDACTED]
Cc: Whellan, Michael [REDACTED]
Subject: Document circulated today at Ethics Review Commission Working Group

Attached is the document many of us worked on this morning and we circulated and discussed at the working session meeting over lunch.

As you know, we are meeting at my office tomorrow starting at 3:30 p.m. to work our way through the remaining open items.

I am sending the document to you without page numbers or a footer, so everyone has precisely what I handed out – I'll get page # and footer with date on tomorrow's version.

All good.

MJW.

Michael J. Whellan
Direct: 512.480.5734
Facsimile: 512.480.5834
E-mail: [REDACTED]



GRAVES DOUGHERTY HEARON & MOODY

401 Congress Avenue, Suite 2200
Austin, Texas 78701
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Stakeholder Discussion Document

10-30-2017

ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 – FINDINGS; PURPOSE; APPLICABILITY.

- (A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.
- (B) The council finds that it is in the City's interest:
 - (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The council intends that:
 - (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) This article applies to all solicitations except:
 - (1) City social service funding;
 - (2) City cultural arts funding;
 - (3) federal, state or City block grant funding;
 - (4) the sale or rental of real property;
 - (5) interlocal contracts or agreements; and
 - (6) solicitations specifically exempted from this article by council.
- (E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 2011111052.

§ 2-7-102 – DEFINITIONS.

In this article, ~~for all purposes whenever used:~~ [\[Agree\]](#)

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:

- (a) a person [authorized by and](#) acting at the ~~explicit~~ request of respondent ~~in exchange for any type of consideration;~~ [\[Agree\]](#)

~~(b) — a person acting with the knowledge and consent of a respondent;~~ [\[Agree\]](#)

~~(c) — a person~~ [authorized by and](#) acting with ~~explicit~~ [any arrangement,](#) coordination, or direction between the person and the respondent; [\[Agree\]](#)

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(d) (b) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;

(e) (c) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and

(f)(d) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.

(2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.

(3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).

(4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).

(5) ~~NO CONTACT RESTRICTED COMMUNICATION~~ PERIOD means the period of time beginning at the final effective date and time a Response to a solicitation is due, ~~as may be extended in the purchasing officer's discretion,~~ and continuing through the earliest of the following [Republic - disagrees; Synagro, TDS, TCE - agree]:

(a) the date of the initial execution of the last contract resulting from the solicitation is signed ~~(-if multiple contracts are executed pursuant to a solicitation, then the date of initial execution of the last contract to be signed)~~ and staff, within 2 business days, will notify all respondents of the contract execution; [Agree]

(b) ~~60~~ 30 days following council authorization of the last contract resulting from the solicitation [Synagro agrees with 60 days; Republic - disagrees and wants old ALO; TCE - 30 or 60 days is fine; TDS - 30 days]; ~~or~~

(c) ~~cancellation of the solicitation by the City;~~

(d) 14 days prior to the date a contract or RCA related to solid waste, recycling or organics is considered for action by the City Council, unless a contract is posted with the City Council agenda in which case the Restricted Communication Period remains in place pursuant to subparagraph 5(b), [Synagro, Republic - disagree; TDS - agrees and offers compromise related to posting contract; TCE - wants broader application to all types of contracts] or

~~(e)~~(e) 14 days prior to the date a contract or RCA is considered for recommendation by the Zero Waste Advisory Commission [See (d) above for stakeholders' positions].

(6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.

(7) RESPONSE means ~~a response to a solicitation, only the contents of the a sealed proposal or bid submitted by an offeror or a bidder offering to provide the goods or services solicited by the City. [Synagro, TDS, TCE - agree]~~

(8) RESPONDENT means a person who ~~makes~~ submits a Response to a City solicitation, ~~even if that person subsequently withdraws its rResponse or has been disqualified by the City, [Subject to short appeal process with stay language]~~ and includes:

(a) ~~a contractor for a respondent;~~ [Synagro, TDS, TCE - agree]

~~(b)~~(a) a subsidiary or parent of a respondent; and

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~~(c)~~ a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and [Synagro - probably ok - because of definition of "Agent" will confirm]

~~(d)~~(b) a contractor or subcontractor to a respondent in connection with that respondent's response. [Synagro, TCE, TDS - agree]

(9) REPRESENTATION means a communication, ~~whether or not initiated by a respondent or agent,~~ that is: [Synagre, TDS, TCE - agree]

- (a) related to a response;
- (b) made by a respondent or agent; and

(c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation. [Did not reach]

~~(c)~~(d) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article. [Did not reach]

(10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;
- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 – PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that: ~~is intended to or reasonably likely to:~~ [Did not reach]

- (1) provides substantive information about the response to which it relates;

~~(2) advance the interests of the respondent with respect to the solicitation to which it relates;~~

~~(3)(2) discredit the response of any other respondent to the solicitation to which it relates;~~

~~(4)~~ [NOTE – an alternative to strikeout may be something like “Permitted representations under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3).” This resolves any potential interpretive conflict between those provisions.] [Did not Reach]

~~(5)~~(3) encourages the City to reject all of the responses to the solicitation to which it relates;

~~(6)~~(4) conveys a complaint about the solicitation to which it relates; ~~or~~

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(5) directly ~~or indirectly asks, influences, or persuades~~ any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates [Did Not Reach]; or

~~(7)(6)~~ knowingly or willfully make a false statement of the facts to a person identified in Section 2-7-9(c), or cause a copy of a document the person knows to contain a false statement to be received by a person identified in Section 2-7-9(c) without notifying the person identified in Section 2-7-9(c) in writing of the truth.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~ any person or entity and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation; [Did Not Reach]
- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- ~~(9) any communication occurring when~~ making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*) [Synagro, TCE, TDS - agree]; and
- ~~(9)(10)~~ any communication by a respondent solely related to a disqualification due to a violation of this Article 6. [For discussion]

Source: Ord. 20071206-045; Ord. 20111110-052.

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§ 2-7-105 – MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer must promptly transmit any such written waiver, modification, or reduction to all respondents. [Synagro, TCE, TDS - Agree]

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 – ENFORCEMENT.

~~(A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.~~ [Synagro, TCE, TDS - Agree]

~~(B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.~~ [Did not reach]

~~(C)~~(A) The purchasing officer has the authority to enforce this article through Council approved rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice, and protest hearing and appeal process for respondents disqualified pursuant to Section 2-7-107, including: [Did not Reach]

- (1) written notice of the penalty imposed pursuant to Section 2-7-107;
- (2) written notice of the right to protest the penalty imposed a hearing before, and determination by, the Ethics Review Commission; [Did Not Reach] and
- (3) written notice of the right to request a an impartial hearing process a final appeal before the —City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 – PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same ~~or similar~~ project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a “same or similar solicitation for the same ~~or similar~~ project”. [Synagro, TDS, TCE - agree]
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City Council. [Synagro, TCE, TDS - agree]

Source: Ord. 20071206-045; Ord. 20111110-052.

~~§ 2-7-108~~ — ~~RECUSAL~~ REPORTING OBLIGATION - [For Discussion]

- (A) During a no-contact period, a person identified in Section 2-7-102(~~109~~)(c) shall not contact a respondent ~~regarding a response or to~~ solicit a prohibited representation from a respondent.
- ~~(B)~~ A person identified in Section 2-7-102(~~109~~)(c) that receives a prohibited representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.
- (B) If a person identified in Section 2-7-102(~~109~~)(c) violates either Subsection (A) or Subsection (B), that person shall ~~be recused~~ recuse themselves from further participation in the solicitation to which the violation relates.
- ~~(C)~~ Chapter 2-7, Article 3 (Violation: Complaint And Hearing Procedures) applies to this section, and a sworn complaint alleging a violation may be filed under the procedures of that article.
[For Discussion]

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